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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ADIDAS AMERICA, INC., an Oregon corporation;
4 and ADIDAS AG, a foreign entity,

5 Plaintiffs,

6 v.

21 Civ. 5615 (JSR)

7 THOM BROWNE, INC., a Delaware corporation,

8 Defendant.

9 New York, N.Y.
10 January 10, 2023
9:15 a.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge
14 -and a Jury-

15 APPEARANCES

16 KILPATRICK TOWNSEND & STOCKTON LLP
Attorneys for Plaintiffs
17 BY: R. CHARLES HENN, JR.
H. FORREST FLEMMING III
18 BETHANY R. NELSON

19 WOLF GREENFIELD & SACKS, PC
20 Attorneys for Defendant
21 BY: ROBERT MALDONADO
HARLEY LEWIN
22 BRYAN CONLEY
TONIA SAYOUR

23 ALSO PRESENT:
24 NITA GRAY, adidas paralegal
MICHAEL PUSTERLA, Thom Browne paralegal

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(Trial continued; jury not present)

THE COURT: Thank you very much for your chart of the remaining witnesses which would have the evidence concluded by 1:00 p.m. tomorrow. Now the juror who has to go to the funeral I'm told has to leave at 12:00. So I think what makes sense is I will ask the jury to come in at 9:00 tomorrow. That will pick up a half hour and maybe we can shorten things as we go along. If we can't, and we have a half hour of testimony on Thursday morning before we start summations, it's not the end of the world.

Yes?

MR. HENN: The other thing I wanted to raise, your Honor, is that we do have two significant objections with regard to two of the witnesses that could, frankly, shorten their testimony depending on what your ruling is on those. I don't know if you want to hear those arguments now.

THE COURT: We will at least spend a few minutes. Because of the schedule, I want to start promptly at 9:30 if the jury is here, but we can at least start hearing that.

MR. HENN: Sure.

THE COURT: But before we get to that, you were also going to tell me how long you wanted for your closing arguments.

MR. HENN: You proposed 90 minutes. That works for me.

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1 THE COURT: Okay.

2 MR. MALDONADO: That's fine, your Honor.

3 THE COURT: Excellent.

4 What are they?

5 MR. HENN: The first relates to a witness who will
6 be -- this afternoon Langellier, I think is how he pronounces
7 his name. There are three exhibits defense plans to introduce
8 with him, Exhibits 188 through 190. What these exhibits are
9 are multipage collections of individual invoices that Thom
10 Browne sends out to stores like Barneys, Bergdorf and
11 Nordstrom. That's what they are. In some cases they are
12 hundreds of pages long. These have sporadic highlighting
13 within them, which we think is what Thom Browne will argue are
14 4-Bar products that were sold to those companies. The reason
15 they want them is they relate -- they're older invoices from
16 back in the 2010, 2011 timeframe.

17 We have two objections to them. The first is a 401,
18 403 issue which is, for example, Exhibit 188, 430-something
19 pages long. Within that, there are a handful that have
20 highlighting on them. And so by putting in the 400 pages, of
21 course, it suggests look at all these sales when in fact it's
22 these tiny highlights.

23 The second issue is there is no evidence in the record
24 nor is there any evidence on Defendant's Exhibit list that
25 would allow a juror to see what any of those highlighted

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1 products look like. They have SKU numbers but none of those
2 SKU numbers match images that defense and, frankly, we have put
3 in the record. There are some of those descriptions that
4 mention 4-Bars but a lot don't, and so there's no way for a
5 juror, for example, to assess whether this one highlighted
6 portion in this 400-page document actually was a 4-Bar product
7 and assess whether, for example, adidas should have known about
8 it.

9 That issue is compounded by the witness they have
10 chosen to try and put this in. The witness they've chosen to
11 put in is a witness who has never been responsible for
12 wholesale sales of these accounts. He's responsible for Thom
13 Browne's own stores. The person who is responsible for the
14 wholesale sales, Mr. Sternstein, they withdrew as a witness.
15 Their 30(b)(6) witness, who, by the way, testified on behalf of
16 the company that he had no idea what the highlighting meant, so
17 he would not have notice of what the highlighting meant, was
18 here all last week, and they removed or they never named him as
19 a witness.

20 So we've got a witness who doesn't know anything about
21 it. We've got 30(b)(6) testimony binding them to the fact that
22 they don't know what the yellow highlighting means, and we've
23 got hundreds of pages of sales, which only a tiny fraction
24 appears to be remotely relevant. For those reasons, we think
25 those exhibits should be excluded and the witness shouldn't be

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1 able to talk about them.

2 THE COURT: I think the problem of multipages could be
3 dealt with by simply preparing a new exhibit that only has the
4 highlighted items, but let me hear from defense counsel of the
5 other objections.

6 MS. SAYOUR: Yes, your Honor. At the outset, I just
7 want to note these exhibits are listed on plaintiff's own
8 Exhibit list. We are using our defendants numbers, but they
9 are on Plaintiff's Exhibit lists. They are Plaintiff's Exhibit
10 1184, 1186 and 970. I don't know that they've objected to
11 those.

12 On the grounds of relevance and prejudice, part of the
13 testimony is going to come in through this witness. I'm not
14 planning to go through the 400-and-some-odd pages, but I will
15 show him the relevant pages and do the matchup to some of
16 the --

17 THE COURT: What are the highlighted items?

18 MS. SAYOUR: They are 4-Bar sweatpants with the
19 4-Bars, different colors. So there will be an invoice, for
20 example, to Barneys which would have, you know, that particular
21 style, and it would show the sales to Barneys in 2011.

22 THE COURT: And how does he know about this?

23 MS. SAYOUR: Well, at the time he wore -- he'll
24 testify to this, I believe, but he wore many hats, so back in
25 the day when the company was smaller --

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1 THE COURT: Well, he wore many hats but were they all
2 with the 4-Bars?

3 MS. SAYOUR: He does have knowledge of those early
4 days from the company.

5 THE COURT: Well, I think that given those
6 representations, I will give the choice to plaintiff's counsel.
7 Would you prefer we reduce the exhibit just to a new exhibit
8 that has only what are now the highlighted items and therefore
9 the jury will not be blessed with all the other entries, or do
10 you prefer to put in the whole entry and say to the jury, look
11 how small a percentage of this were bought.

12 MR. HENN: I anticipated if you were going to let it
13 in, we've got to let it in all so we can point out the little
14 needles in the big haystack.

15 THE COURT: So we'll proceed on that.

16 MR. HENN: Do you want to take up the other one?

17 DEPUTY CLERK: All jurors are present.

18 THE COURT: All jurors are present, so we'll take it
19 up at a recess.

20 MR. HENN: Sounds good.

21 (Continued on next page)

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Bazan - Cross

1 (Jury present)

2 RODRIGO BAZAN, resumed.

3 CROSS-EXAMINATION CONTINUED

4 BY MR. HENN:

5 THE COURT: Good morning, ladies and gentlemen. I
6 wanted to give you a little heads up on our schedule. We are
7 hopeful and modestly confident that we can conclude the
8 evidence in this case by around noon tomorrow, in which case we
9 would just stop at noon so that Juror No. 4 can go to that
10 funeral. And I take it if you leave right at noon, that will
11 work?

12 (Juror nods yes)

13 THE COURT: Very good. But to make that all work, we
14 need to start at 9:00 a.m. tomorrow rather than at 9:30.

15 So the good news is tomorrow we will only be sitting
16 from 9:00 to 12:00. The bad news is you've got to get up a
17 little bit early. Is that a problem for anyone?

18 (Jury indicating no)

19 THE COURT: Very good. Let's continue.

20 BY MR. HENN:

21 Q. Nita, will you pull up Exhibit 55 at page 54.

22 Mr. Bazan, do you remember yesterday when I asked you
23 about the sales of the shoe there in the middle?

24 A. Yes.

25 Q. And you told us that the shoe is no longer for sale by the

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Bazan - Cross

1 company?

2 A. Yes.

3 Q. And when I asked whether it was still for sale in May of
4 2022, you suggested that the document I showed you referenced a
5 different shoe. Do you remember that?

6 A. Yes.

7 Q. Let me have Nita pull up just for the witness again -- let
8 me pause. Do you see that MFD number next to the shoe
9 Mr. Bazan?

10 A. Yes.

11 Q. You understand that's the number that allows you to track
12 what shoe is what in the system?

13 A. Yes.

14 Q. Nita, will you just for the witness pull up the other
15 exhibit side by side with this one? If you will pull out the
16 corresponding MFD numbers from those exhibits and blow them up.

17 Mr. Bazan, do you see that the exhibit I showed you
18 from May of 2022 bears the same SKU number as in the accused
19 shoe?

20 A. Yes.

21 MR. HENN: Your Honor, we would offer that impeachment
22 exhibit as Exhibit 1321 and ask it be published.

23 MR. MALDONADO: I was focusing on the other one.
24 Object on hearsay grounds.

25 MR. HENN: It's an image from Thom Browne's website,

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Bazan - Cross

1 your Honor.

2 THE COURT: Well, is there someone who -- are the
3 parties agreed on that; that it's from the Thom Browne website?

4 MR. HENN: Yes. Authenticity was stipulated.

5 THE COURT: Then the hearsay objection is overruled
6 and the exhibit is received.

7 (Plaintiff's Exhibit 1321 received in evidence)

8 Q. May we just publish that for the jury?

9 So you see, Mr. Bazan, that those are in fact the same
10 shoe?

11 A. Yes, I see, and I was focused on the one on the bottom.

12 Q. If we take out the blowups, Nita and just allow the jury to
13 see Exhibit 1321, that is from your website, correct,
14 Mr. Bazan?

15 A. Yes.

16 Q. And if you look at the bottom captured timestamp, this is
17 what the website looked like as of May 2022, right?

18 A. Yes.

19 Q. That was years after adidas objected to the use of four
20 stripes by Thom Browne, correct?

21 A. Yes.

22 Q. We could take that down.

23 I believe when we finished up yesterday, we were
24 talking about the expansion into sportswear, and we had gotten
25 as far as 2020. I want to now look at 2021. We can pull up

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Bazan - Cross

1 Plaintiff's Exhibit 876. This is already in evidence.

2 Mr. Bazan, do you recognize this as an email from you
3 to Mr. Browne sharing your product strategies in 2021?

4 A. Yes.

5 Q. If we go over to page 3, we have one of your product
6 strategies to expand athletic expression, correct?

7 A. Yes, and this was an idea, something that was considered.
8 In fact, this never happened. And, if anything, this was
9 planning it was going to be in the same very high quality,
10 almost obsessively high quality of compression that you've seen
11 in clothing, but in fact it never happened. It never was even
12 developed.

13 Q. Never expanded into compression?

14 A. No. Roll-out technology to bags and footwear. We already
15 had compression at that time. This was expansion into the
16 following categories.

17 Q. I see. So the expansion into compression was 2020. You
18 thought about doing it again in 2021, but you never followed
19 through?

20 A. We considered if the materials are of very high quality
21 thousands of dollars could make into another category,
22 different category. In fact, it was never developed.

23 Q. Take that down. We will shift that over to another area.

24 You talked on direct about the fact that you
25 periodically enforce your own trademark marks against other

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Bazan - Cross

1 companies. Do you recall that testimony?

2 A. Yes.

3 Q. And you mentioned that you had enforced Thom Browne's
4 trademark rights against Rossignol?

5 A. Yes.

6 Q. That was a situation in which Rossignol was using three
7 stripes?

8 A. They were using, I recall, a very similar placket in the
9 front of the jacket like the one I'm wearing, very similar in
10 the same positioning, and I believe also in the back of the
11 collar, if I'm not incorrect.

12 Q. You said on direct that it was three stripes. Was theirs
13 three stripes or more?

14 A. Ours your five: White, red, white, blue, white. Theirs, I
15 believe, they were three colors.

16 Q. And so even though yours was five, you enforced your
17 trademark rights against their use of three colors, correct?

18 A. We contacted them because the use of these type of plackets
19 in the position was extremely similar or the same as ours, and
20 in fact they amicably stopped doing that.

21 Q. You say it was similar. It wasn't identical, right? Yours
22 is five; theirs is three, right?

23 A. Yes.

24 Q. So it was similar, and what concerned you was the similar
25 look and the similar placement?

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Bazan - Cross

1 A. Yes, and also that it came across in outerwear very similar
2 to what we do.

3 Q. Also similar products?

4 A. Yes.

5 Q. You also enforced your rights in these various striped
6 designs against other companies, haven't you?

7 A. Yes.

8 Q. Against Moncler?

9 A. Yes.

10 Q. Tommy Hilfiger?

11 A. Yes.

12 Q. Zara?

13 A. Yes.

14 Q. Vilebrequin, V-I-L-E-B-R-E-Q-U-I-N?

15 A. I understood. Yes.

16 Q. You enforced against them as well?

17 A. Yes, we -- our lawyers contacted them and we amicably
18 always resolved any type of possible infringement of confusion.

19 Q. And those companies agreed to stop doing the infringing
20 designs?

21 A. Yes. From the followup that we did, we never had any more
22 problems with any of them.

23 Q. And in each case you took that action because you were
24 concerned that it was similar to your design?

25 A. We took the action because it was going to be possibly

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Bazan - Cross

1 confusing for them and for us, and because of the participation
2 of diligent lawyers in both parties, it didn't make sense for
3 either party to do that.

4 Q. You were concerned about the potential confusion. In any
5 of those cases, had you ever had an actual consumer express
6 confusion?

7 A. No.

8 Q. Let's shift gears.

9 You mentioned that Thom Browne has a number of
10 celebrities who wear the 4-Bars clothing. Do you recall that
11 testimony?

12 A. Yes.

13 Q. It is correct that once someone buys Thom Browne clothing,
14 they can wear it wherever they want and however they want?

15 A. Yes.

16 Q. Can we pull up from Plaintiff's Exhibit 386, just page 47?

17 MR. HENN: Your Honor, we would offer this page as
18 Exhibit 1322.

19 MR. MALDONADO: Objection. Hearsay.

20 MR. HENN: Not offered for the truth, your Honor.

21 THE COURT: All right. So, ladies and gentlemen, this
22 is not being offered for the truth of what was said but rather
23 just for the fact that it appeared. So with that
24 understanding, it will be received.

25 (Plaintiff's Exhibit 1322 received in evidence)

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Bazan - Cross

1 Q. Mr. Bazan, do you recognize Ms. Jenner there wearing Thom
2 Browne sweatpants?

3 A. Yes.

4 Q. She's wearing that with just a black turtleneck and
5 non-Thom Browne shoes, correct?

6 A. I believe so.

7 Q. Can we go over to page 53 of this Exhibit?

8 MR. HENN: Your Honor, we would offer pages 53 and 54
9 as Plaintiff's Exhibit 1323.

10 THE COURT: On the same terms?

11 MR. HENN: Same terms.

12 THE COURT: Received on the same terms.

13 (Plaintiff's Exhibit 1323 received in evidence)

14 Q. Mr. Bazan, do you recognize Brandon Ingram down there, one
15 of the athletes who wears Thom Browne?

16 A. I see an athlete wearing Thom Browne. I don't recognize
17 him specifically, but yes.

18 Q. If we go to the second page, this is a little strange
19 because of how it's captured on the internet, but it's one
20 picture, page 54. At the top there, you see the bottom half of
21 Mr. Ingram, and you see he's wearing adidas shoes with his Thom
22 Browne outfit?

23 A. I guess they're adidas. I don't know specifically the
24 style.

25 Q. You see the three stripes on the side, correct?

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Bazan - Cross

1 A. A little bit covered but possibly is.

2 Q. If we stay on this exhibit now and go over to page 63.

3 MR. HENN: We would offer this one page, your Honor,
4 as Plaintiff's Exhibit 1324, same terms.

5 MR. MALDONADO: Same objection.

6 THE COURT: Same ruling. Received.

7 (Plaintiff's Exhibit 1324 received in evidence)

8 Q. Nita, if you'll zoom in on the photograph.

9 Mr. Bazan, do you recognize this as a football game
10 that was organized by the company?

11 A. Yes, possibly before I joined the company.

12 Q. You invited the media to attend and photograph the game?

13 A. Friends of the brand, yes, and some media.

14 Q. Can you tell me what shoes all of those players are
15 wearing?

16 A. It looks like it's adidas.

17 Q. Was it Thom Browne's decision to outfit the players in a
18 football game with Thom Browne sweats and adidas shoes?

19 A. I don't know myself because I think it's a game before I
20 joined the company, but I don't know.

21 Q. Take that down. The company has a Facebook page, correct?

22 A. Yes.

23 Q. If we go to Plaintiff's 222.

24 MR. HENN: Your Honor, we'd offer this in evidence.
25 It's a post from Mr. Browne's account or, excuse me, the

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Bazan - Cross

1 company's account.

2 THE COURT: Any objection?

3 MR. MALDONADO: No objection.

4 THE COURT: Received.

5 (Plaintiff's Exhibit 222 received in evidence)

6 Q. Mr. Bazan, you recognize this as a post that Thom Browne
7 put out on Facebook?

8 A. Yes, it looks like a post from Thom Browne.

9 Q. In this instance, you've got someone wearing Thom Browne's
10 compression apparel. Is that correct?

11 A. Yes, I guess it's one of the friends of the brand that were
12 invited to shoot themselves. I guess he's wearing the way he
13 prefers.

14 Q. Can you tell me what socks he's wearing in the photograph
15 that Thom Browne posted?

16 A. It looks like a trefoil from adidas and looks like he has
17 Nike sneakers.

18 Q. Was Thom Browne intentionally or why did Thom Browne
19 intentionally decide to post a photograph of someone wearing
20 Thom Browne apparel with adidas socks?

21 A. I don't know, but it's -- as I say, it's unpaid always when
22 we engage with celebrities or athletes, and this looks like
23 something taken by himself.

24 Q. That was then reposted by Thom Browne on its account?

25 A. Because I guess he's a friend of the brand and our team

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Bazan - Cross

1 decided to post the image, yes.

2 Q. Then Dan Levy is also someone who wears Thom Browne,
3 correct?

4 A. And I believe a client also of Thom Browne.

5 Q. Can we pull up Plaintiff's Exhibit 852. We should just
6 show this to the witness first.

7 Mr. Bazan, do you recall us looking at this television
8 ad during your deposition?

9 A. Yes.

10 Q. This was an advertisement in which Mr. Levy was wearing
11 Thom Browne apparel, correct?

12 A. Yes.

13 MR. HENN: Your Honor, we offer Exhibit 852.

14 MR. MALDONADO: Well, your Honor, I would object
15 because it's just a screen image that's on the screen, but if
16 it's the video, there's no objection.

17 MR. HENN: We are going to play the video, your Honor.

18 THE COURT: All right. So the video is received.

19 (Plaintiff's Exhibit 852 received in evidence)

20 Q. Nita, if you will play Exhibit 852 for us. Just one time
21 through should be sufficient.

22 (Video played)

23 MR. HENN: It's not on the jury's screen. Publish to
24 them before you play and start it over.

25 There we go. Play it again.

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Bazan - Cross

1 (Video played)

2 Q. You saw Mr. Levy there in the ad wearing Thom Browne
3 apparel in the gym?

4 A. I see him wearing in this very ironic way. It looks like
5 somebody is not even trying to exercise. He just wants to show
6 off his look. He's a client of the brand. I believe he bought
7 the merchandise. Like Lebron James brought the merchandise and
8 has an ad of him walking to a plane. So it's similar ad.

9 Q. So once they buy the product, they can then wear it out in
10 the public however they want?

11 A. Like you could do as well.

12 Q. Including in television advertising?

13 A. We don't control that. And everything that we do is
14 unsolicited. So if somebody likes it, enjoys it, Lebron James
15 did it in an ad, and in this case Dan Levy did it also.

16 Q. Post sale, after sale, you no longer have any control on
17 how it appears, correct?

18 A. I don't think so.

19 Q. Let's pull up Plaintiff's Exhibit 999.

20 Mr. Bazan, do you recognize this as a capture from
21 Thom Browne's website of last assume err, 2022?

22 A. Yes.

23 MR. HENN: Your Honor, we offer exhibit 999.

24 MR. MALDONADO: No objection.

25 THE COURT: Received.

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Bazan - Cross

1 (Plaintiff's Exhibit 999 received in evidence)

2 Q. Publish that, Nita.

3 Mr. Bazan, what we see on the first page of Exhibit
4 999, that was the top of the home page of Thom Browne's website
5 last summer, correct?

6 A. Yes.

7 Q. And if we look at the model at the very top of the page,
8 how many stripes are on those shorts?

9 A. Four.

10 Q. How many stripes do you see on those shorts?

11 A. Four. I'm wearing glasses and I have an image here. It's
12 one, two, three and four. There's a white line in between the
13 third and the fourth.

14 Q. Gotcha. Let's back out of that picture.

15 What about the lower left image, how many stripes are
16 on that product?

17 A. Four.

18 Q. How many stripes do you see in the picture that was on the
19 website?

20 A. One, two, three, four.

21 Q. Take that down.

22 Thom Browne has an Instagram account, correct?

23 A. Yes.

24 Q. Let's pull up Exhibit 219. Zoom in at the top.

25 You recognize this as an Instagram post of the Thom

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Bazan - Cross

1 Browne account?

2 A. Yes.

3 MR. HENN: Your Honor, we offer Exhibit 219.

4 MR. MALDONADO: No objection.

5 THE COURT: Received.

6 (Plaintiff's Exhibit 219 received in evidence)

7 Q. Mr. Bazan, do you see there where one of the consumers
8 posted "thought it was adidas, sorry." And tagged adidas at
9 adidas?

10 A. Yes, I see one comment out of hundreds of thousands of
11 comments on our post.

12 Q. Do you see hundreds of thousands of comments here?

13 A. If you collect them all the time that we're looking at,
14 there's hundreds of thousands of comments I believe on social
15 media how Thom Browne looks.

16 Q. It's your testimony that as to this one post, there are
17 hundreds of thousands of comments?

18 A. Not on this post. On the collective of all. You're
19 showing me one with one comment and that is I think it's worth
20 putting into perspective. We don't even know who the person is
21 that commented.

22 Q. Let's look at Exhibit 217. We can zoom in at the top. You
23 recognize this as another Instagram post from Thom Browne?

24 A. Yes.

25 MR. HENN: And, your Honor, we offer Exhibit 217.

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Bazan - Cross

1 MR. MALDONADO: Objection. Hearsay.

2 MR. HENN: This is the subject of a motion in limine
3 your Honor that you denied.

4 THE COURT: Received on the same terms as previously
5 noted.

6 (Plaintiff's Exhibit 217 received in evidence)

7 Q. Mr. Bazan, do you see that one of the comments out to the
8 right on the screen, the person wrote "so hashtag adidas"?

9 A. Yes, I see it, and my same comment as the previous image.
10 If you had found a thousand of them, you would be showing a
11 thousand. I think there were a handful that have been shown to
12 me.

13 Q. Do you see how the shorts in the model cover most of the
14 top stripe?

15 A. Not most. I think on the left angle you can see most of
16 it.

17 Q. You would agree that someone buying your tights could then
18 wear them under shorts out in the public as we discussed?

19 A. Yes.

20 Q. And those shorts might cover one or more of the stripes,
21 correct?

22 A. May or may not.

23 Q. Let's pull up Exhibit 218. Do you recognize this as a
24 Facebook post from Thom Browne?

25 A. Yes.

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Bazan - Cross

1 MR. HENN: Your Honor, we offer Exhibit 218.

2 MR. MALDONADO: Same objection.

3 THE COURT: Same ruling.

4 (Plaintiff's Exhibit 218 received in evidence)

5 Q. If we could publish that.

6 Mr. Bazan, before we look at the comments -- if you
7 look at the picture there on the left, with regard to the male
8 model, how many stripes are on the shorts?

9 A. I know it's four because I know the article.

10 Q. But how many are in the picture when the person is walking?

11 A. Because it's covered by the hand in this specific, look you
12 see less.

13 Q. You see three, right?

14 A. I see two completely. Another one partially covered. But
15 you see very clearly on the sleeve, as the sleeve usually hangs
16 with his arm is down like this, you can see very horizontal
17 four stripes on both male and female in the picture.

18 Q. With regard to the tights on the male model, you will agree
19 that only three of the stripes are visible because the shorts
20 are covering one of the stripes completely?

21 A. In this specific image.

22 Q. Can we turn over to page 2.

23 You see the comment in the lower right, "How come
24 there's four stripes? Is that Lavo market mock adidas." Do
25 you see that?

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Bazan - Redirect

1 A. I see the comment about the four stripes, so clearly even
2 though you ask me if I'm confused about the four stripes, the
3 comments pointed to the four stripes, yes.

4 Q. Since adidas initiated this lawsuit, Thom Browne has not
5 taken any steps to reduce the risk that consumers would be
6 confused by your products, correct?

7 A. We continue the ordinary business that we've been doing on
8 a trademark we've been using for over 13, 14, 15 years, so we
9 continue to do the same product strategies, the same very
10 elevated positioning. We never compromise on that. And we
11 expanded in the same way, particularly for the women's, kids,
12 and all of our own stores, which are over a hundred today.

13 Q. So if I understand your testimony, it was just business as
14 usual. You didn't take any steps to reduce confusion?

15 A. We continue to be correct about the way we use our own
16 trademark vis-a-vis other trademarks, yes.

17 MR. HENN: No further questions.

18 THE COURT: Redirect.

19 REDIRECT EXAMINATION

20 BY MR. MALDONADO:

21 Q. Good morning, Mr. Bazan.

22 A. Good morning.

23 Q. Do you recall counsel asking you about various shoe items
24 that have been accused of infringement in this case?

25 A. Yes.

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Bazan - Redirect

1 Q. And that you had testified that the sales of those items
2 were small?

3 A. Yes.

4 Q. Over what period of time did those sales occur?

5 A. I guess over the years that the product was present in our
6 collection.

7 Q. Do you know how many years those products were present in
8 the collection?

9 A. Could be three, four, five in total.

10 (Continued on next page)

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Bazan - Redirect

1 BY MR. MALDONADO:

2 Q. Thank you.

3 If we can take a look at Plaintiff's Exhibit 857,
4 please, page three.

5 Mr. Bazan, this is a document that was shown to you
6 during your cross-examination.

7 Do you remember this document?

8 A. Yes.

9 Q. And in this document there are two columns in the chart,
10 correct?

11 A. Yes.

12 Q. One of which is tailoring on the left?

13 A. Yes.

14 Q. And sportswear on the right?

15 A. Yes.

16 Q. And do those two columns represent all of the clothing that
17 is sold by Thom Browne?

18 A. Yes.

19 Q. So all clothing fits either into the tailoring category or
20 the sportswear category?

21 A. All the clothing, yes.

22 Q. Yes, correct.

23 That comports with your earlier testimony as to what
24 your definition of sportswear is, correct?

25 A. Correct. Anything that which is not tailoring, so tailored

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1 jacket, coat, the pant, skirt, is sportswear.

2 Q. OK. If we can look now at exhibit, Plaintiff's Exhibit
3 788, at page two. This is a document that counsel showed to
4 you.

5 Do you remember this document?

6 A. Yes.

7 Q. And counsel asked you about development of a down jacket.

8 Do you recall that testimony?

9 A. Yes.

10 Q. Does Thom Browne currently sell down jackets?

11 A. Yes. We have a wide range of outdoor, including down
12 jackets, correct.

13 Q. Approximately how many down jackets do you sell?

14 A. Units or how many styles?

15 Q. How many styles?

16 A. How many styles? I would say ten. Just to be clear, a
17 style is a specific jacket and come in different colors. At
18 least we have ten down jacket styles, which can relate to close
19 to 50 or 70 color applications, materials, and colors.

20 Q. And you're familiar with of the products accused of
21 infringement in this case?

22 A. Yes, I am.

23 Q. Are all of your down jackets accused of infringement in
24 this case?

25 A. A good amount of them, including the trademark four-bar.

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Bazan - Redirect

1 Q. I'm sorry?

2 A. A good amount of them, include the four-bar trademark.

3 Q. But not all of them are accused?

4 A. No.

5 Q. Now, you might recall, Mr. Bazan, you might recall Mr. Henn
6 asking you about the appearance of the four bars on various
7 items of clothing?

8 A. Yes.

9 Q. How does Thom Browne define its four-bar trademark?

10 A. We define it as horizontal, always on the arm, always on
11 the leg. It could be white, could be tonal, could be in
12 different colors, but mostly white. Assymetrical, only one
13 side of the leg and the arm, and thick, thick bands that you
14 see with a narrow spacing.

15 Q. Does Thom Browne ever use its four-bar trademark vertically
16 on a sleeve?

17 A. No.

18 Q. Does Thom Browne ever use its four-bar trademark vertically
19 on a pant leg?

20 A. No.

21 Q. Now, counsel asked you about various items on the rack and
22 various items that were and were not accused of infringement.

23 Are you familiar with the products that have been
24 accused of infringement in this action?

25 A. Yes.

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Bazan - Redirect

1 Q. OK. Do you recall which was the item that adidas
2 originally accused of infringement in 2006?

3 A. I think it's the one in the image.

4 Q. What was the product?

5 A. It's a cashmere cardigan which retails at \$1700 today.

6 Q. Do you recall it was a sport coat?

7 A. Yes.

8 Q. OK. And are sport coats accused of infringement in this
9 case?

10 A. I think so, yes.

11 Q. OK. Let's look at the Exhibit 55, please.

12 If you could flip through the pages and tell me if you
13 see any sport coats.

14 A. It's not included there, no.

15 Q. So the sport coat was accused of infringement in 2006, but
16 is not accused of infringement today, correct?

17 A. Correct.

18 Q. OK. When the complaint was filed in this case, did you
19 have a chance to review the complaint?

20 A. Yes.

21 Q. And do you see the items that were accused of infringement
22 in the complaint?

23 A. 2000, sorry, seven?

24 Q. In this lawsuit, the complaint that was filed by adidas.

25 A. The image of 2006?

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Bazan - Redirect

1 Q. Did you review the complaint?

2 A. Yes.

3 Q. And did you see in the complaint images of the items that
4 were accused of infringement when the complaint was filed?

5 A. If I see images of?

6 MR. MALDONADO: Can we pull up the complaint, please.

7 A. Yes.

8 MR. HENN: Your Honor, we have an objection to the
9 exhibit and the line of questioning. A sidebar would be
10 helpful.

11 MR. MALDONADO: Your Honor, the complaint would just
12 be used to refresh.

13 THE COURT: Brief sidebar.

14 (Continued on next page)

1 (At the sidebar)

2 MR. HENN: As your Honor is aware, at the outset of
3 the litigation you might include things in a complaint that
4 over the course of discovery you remove from what is being
5 asserted. And the jury should not be clouded in their view of
6 what is being asserted at trial with what at the point of a
7 notice pleading was included. It's incredibly -- it's not
8 appropriate to show the jury what was at one point potentially
9 within the case when we have specifically narrowed for trial
10 the issue, the items that are to be tried, and that is what is
11 in Exhibits 55 and 56.

12 MR. MALDONADO: It's actually not narrowed. It's
13 expanded, and it goes to what our client understands they can
14 and cannot do in the business, as to what is accused and not
15 accused, and I think that can change over time. He can make
16 that argument if he wants to, but that --

17 THE COURT: No. I think the purpose of a complaint is
18 simply to formally initiate a lawsuit and put the other side on
19 reasonable notice of what's being claimed. It is not evidence.
20 It is frequently subject to modification as time goes on, and I
21 think the jury would not understand that and, therefore, would
22 read more into this than really is valid.

23 So the objection is sustained.

24 MR. MALDONADO: Thank you.

25 (Continued on next page)

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1 (In open court)

2 MR. MALDONADO: If we can put Exhibit 55 back up on
3 the screen, please.

4 BY MR. MALDONADO:

5 Q. Mr. Bazan, you're familiar with this listing of accused
6 products?

7 A. Yes, I am.

8 Q. Can you please stay on page one.

9 And this document was originally served on June 3, is
10 that correct?

11 A. Yes.

12 Q. You see then it was updated on June 29 and July 22, is that
13 correct?

14 A. Yes.

15 Q. Let's look at Exhibit 56, please.

16 You understand this to be the accused Grosgrain
17 products?

18 A. Yes.

19 Q. And this document was originally served on June 3, is that
20 correct?

21 A. Yes.

22 Q. And then it was updated on June 29?

23 A. Yes.

24 Q. Thank you.

25 If we go back to Exhibit 55, we can look at page 57.

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1 And you see this cardigan hoodie cashmere cardigan
2 hoodie on the screen in front of you?

3 A. Yes.

4 Q. And you understand that to be a product accused of
5 infringement?

6 A. Yes.

7 Q. If you look over here on the rack, we have a cashmere
8 cardigan sweater.

9 Do you see that?

10 A. Yes.

11 Q. And that does not have a hood?

12 A. Correct.

13 Q. And do you understand that that is a product that is not
14 accused of infringement?

15 A. Correct.

16 Q. So sitting here today, as CEO of Thom Browne, do you have
17 any clarity as to which items Thom Browne can and cannot
18 produce in its business going forward in view of the
19 infringement allegations that have been made in this action?

20 A. No.

21 Q. Counsel showed you various social media posts.

22 Do you remember that?

23 A. Yes.

24 Q. And he showed you comments made by various users.

25 Do you recall that?

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Bazan - Redirect

1 A. A handful, yeah.

2 Q. And do you know if any of those users who posted those
3 comments are employees of adidas?

4 A. No.

5 MR. MALDONADO: I have no further questions, your
6 Honor.

7 THE COURT: All right. Anything else?

8 MR. HENN: Nothing from me, your Honor.

9 THE COURT: Thank you very much. You may step down.

10 (Witness excused)

11 Please call your next witness.

12 MR. MALDONADO: Your Honor, the defense calls Robert
13 Childs.

14 THE DEPUTY CLERK: Yes, please. Remain standing.

15 ROBERT CHILDS,

16 called as a witness by the Defendant,

17 having been duly sworn, testified as follows:

18 Please be seated. State your name and spell it slowly
19 for the record.

20 THE WITNESS: OK. My name is Robert Childs.

21 R-o-b-e-r-t C-h-i-l-d-s.

22 THE COURT: Counsel.

23 MR. MALDONADO: Your Honor, before we get started, we
24 have certain exhibits that have no objection that we would like
25 to read into the record.

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Childs - Direct

1 THE COURT: Yes.

2 MR. MALDONADO: Plaintiff's Exhibit 253, Plaintiff's
3 Exhibit 1314, Defendant's Exhibit 82, 122 through 127, 140,
4 141, 142, 144 through 147, 153, 375, 376, and 460.

5 THE COURT: Received.

6 (Plaintiff's Exhibits 253 and 1314 received in
7 evidence)

8 (Defendant's Exhibits 82, 122 through 127, 140, 141,
9 142, 144 through 147, 153, 375, 376, and 460 received in
10 evidence)

11 DIRECT EXAMINATION

12 BY MR. MALDONADO:

13 Q. Good morning, Mr. Childs.

14 Can you please introduce yourself to the jury?

15 A. Good morning. Yes. Robert Childs. 36. From Key West,
16 Florida, and been living in New York the past 18 years, and
17 employed at Thom Browne.

18 THE COURT: Get a little bit closer to the mic.

19 THE WITNESS: Sorry.

20 Q. You said you were employed by Thom Browne.

21 What's your position at Thom Browne?

22 A. I currently am the women's, director of women's.

23 Q. You mentioned that you moved to New York to go to school.

24 Where did you attend school?

25 A. I went to FIT, Fashion Institute of Technology, here in

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Childs - Direct

1 New York City.

2 Q. What years did you attend FIT?

3 A. I was there from 2005 to 2007.

4 Q. And what degree did you graduate with from FIT?

5 A. An associate's in menswear design.

6 Q. And tell the jury about the types of classes that you took
7 at FIT to get your degree.

8 A. Yeah, so, classes? There was menswear history classes that
9 we took, tailoring classes, pattern making. It was very hands
10 on, like, more of a technical program, so a lot of pattern
11 making. And then our history design and things like that.

12 So, yeah, courses like that.

13 Q. And when did you come to know Thom Browne?

14 A. While I was in school, seeing his fashion shows online.

15 Q. OK. Did you ever visit his stores?

16 A. Not while I was in school. Not his store itself, no.

17 Q. Have you ever had the opportunity while you were a student
18 to view his clothing?

19 A. Yeah. As we do while we're in school, we would go on, I
20 guess, research trips to different stores around town, and so
21 that is when I first saw the brand, like, actually physically
22 in the store, yeah.

23 Q. Where did you see it?

24 A. It was a store called Jeffrey's down in the Meatpacking
25 District. It's no longer there now, but yeah. It was one of

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Childs - Direct

1 the stores that carried Thom at the time.

2 Q. Tell us about your first experience with Thom Browne
3 clothing.

4 MR. FLEMMING: Objection, relevance.

5 THE COURT: Sustained.

6 Q. While you were at the Jeffrey's store, did you see Thom
7 Browne's clothing?

8 A. I did, yeah.

9 Q. Tell us what you saw.

10 A. I saw a rack of clothing that I had only seen in photos
11 online and of the shows. And, um, yeah, it was just including
12 that stood out as Thom Browne.

13 Q. And were you interested in Thom Browne's clothing at the
14 time?

15 A. Sure. Yeah, definitely. From the shows and how special
16 the shows were, the clothing itself was very attractive because
17 of how fun the shows were presented. So definitely was very
18 interested in getting to see the clothing and seeing them up
19 close and touching them.

20 Q. At some point did you apply for a job at Thom Browne?

21 A. I did, yes.

22 Q. When was that?

23 A. In 2007 is when I applied.

24 Q. And what was the interview process like?

25 MR. FLEMMING: Objection, relevance.

1 THE COURT: Sustained.

2 Q. Did you meet with Thom Browne when you applied for your
3 job?

4 A. I did, yeah.

5 Q. And tell us about that meeting.

6 MR. FLEMMING: Same objection.

7 THE COURT: Sustained.

8 Q. What was your initial --

9 When did you start working at Thom Browne?

10 A. I started working in -- after I graduated, right after I
11 graduated, in the summer of 2007.

12 Q. What was your title at the time?

13 A. My title was assistant designer.

14 Q. What were your responsibilities as assistant designer?

15 A. Various things. So we worked -- we had a really small team
16 at the time and worked out of the factory, where we made a lot
17 of the clothing. So it was very hands-on training and
18 experience.

19 So we would receive fabrics. It was my responsibility
20 to check fabrics, and we would maybe have to make little
21 prototypes or examples of things that we wanted to launch with
22 the tailors at the factory.

23 So I would work on things like that, helping take
24 notes during fittings. Yeah, really just, like, that
25 assistant-level stuff, trying to get my designs noticed.

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Childs - Direct

1 Q. OK. And you said it was a very small design team at the
2 time.

3 Who was on the design team in 2007?

4 A. It was myself, Sam Lothrop, and Thom.

5 Q. OK. And how long were you in that position for?

6 A. About two, two and a half years, until I moved into another
7 position.

8 Q. What was the next position?

9 A. I became the design director after Sam had left the
10 company.

11 Q. And were you design director of a certain collection?

12 A. It was all one collection, so really it was the Thom Browne
13 collection.

14 Q. OK. How long were you in that position for?

15 A. Um, I was there until 2011, so from -- yeah, for the last,
16 about, two years of the company.

17 Q. And then you left Thom Browne for a period of time?

18 A. Yes.

19 Q. Where did you go?

20 A. I went to the company -- this company called Adam Kimmel.

21 Q. At some point did you return to Thom Browne?

22 A. I did.

23 Q. When was that?

24 A. In 2019 I came back.

25 Q. You've been there ever since?

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Childs - Direct

1 A. Yes.

2 Q. OK. Thank you.

3 When you became design director, how did your
4 responsibilities at Thom Browne change?

5 A. Um, back then, it was managing a lot of interns, being
6 responsible for, like, the full breadth of taking Thom's vision
7 and idea through to the final samples, customizing fabrics,
8 interactions with the factories, more of a managerial role.
9 And a lot more, like, getting design elements and ideas, like,
10 through the process as opposed to kind of being the assistant
11 in that process.

12 Q. OK. Back in 2007 when you worked at Thom Browne, where
13 were Thom Browne's products sold?

14 A. Um, we were sold around the world at the time. But in New
15 York we were at a store called Barney's, store called Bergdorf,
16 other stores in Europe and Japan and, yeah, a store called
17 Colette in Paris.

18 Q. Did Thom Browne also have its own boutique retail stores?

19 A. Yes, we did.

20 Q. Did you have any in New York City?

21 A. We had our one shop in New York City, yes.

22 Q. What were the types of clothing that were sold by Thom
23 Browne in 2007, when you joined the company?

24 A. A similar assortment to what we have today. Knitwear,
25 cut and sew, jersey, polo T-shirts, underwear, tailoring,

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Childs - Direct

1 outerwear, formalwear, just footwear. We had some bags and
2 accessories. So, yeah, really similar to today, but today,
3 much broader.

4 Q. Did you sell knitwear in 2007?

5 A. We did, yes.

6 Q. What types of knitwear did you sell in 2007?

7 A. So sweaters, duffle coat sweaters, cardigans, pullover
8 sweaters, polo T-shirts, knit T-shirts, tank tops. Yeah,
9 really any sort of, like, knit sweater you would have today, we
10 were offering it.

11 Q. And you mentioned cut and sew and jerseys.

12 What do you mean by that?

13 A. So from -- I put knits in kind of a two-bucket system. So
14 there is full-fashion knits, which are more of, like, the
15 chunkier sweaters, like cashmere sweaters and, like, cardigans
16 and things like that, that are more kind of -- I'm not like a
17 technical designer as far as knitwear, but that's the -- it's
18 more of a thicker yarn. And then you have, like, T-shirts and
19 polo T-shirts, and those are more cut and sew. So, and how
20 they are engineered on the machine is, like, they are different
21 processes. Yeah.

22 Q. OK. Can we pull up Exhibit 460, please.

23 Have you seen this document before, Mr. Childs?

24 A. Yes.

25 Q. Can you tell us what this is?

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Childs - Direct

1 A. This is an item list of products.

2 Q. These are products that were -- what are these products
3 here in this list?

4 MR. FLEMMING: Objection, 602.

5 MR. MALDONADO: There's no objection to this document,
6 your Honor.

7 MR. FLEMMING: To the testimony, I'm sorry.

8 THE COURT: Grounds of the objection?

9 MR. FLEMMING: 602, personal knowledge. He started in
10 the summer of 2007.

11 THE COURT: All right. Lay a foundation.

12 BY MR. MALDONADO:

13 Q. OK. Have you seen this document before, Mr. Childs?

14 A. Yes.

15 Q. And what does this document represent?

16 A. A list of items that Thom Browne offers.

17 Q. Are these products that were sold when you were at Thom
18 Browne in 2007?

19 A. Yes.

20 Q. OK.

21 THE COURT: Did you prepare this list?

22 Did you prepare this list?

23 THE WITNESS: I did not prepare this list, your Honor.

24 THE COURT: All right. Put another question.

25 Q. OK. Do you want to flip down. Scroll down, please.

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Childs - Direct

1 Does this list represent the full collection of
2 products that were sold by Thom Browne in 2007?

3 MR. FLEMMING: Same objection.

4 THE COURT: If you know.

5 A. Full products offered for sale.

6 Q. In 2007, was Thom Browne selling any compression products?

7 MR. MALDONADO: You can take it down, please.

8 A. Can you help define compression?

9 Q. Compression.

10 A. Like, we sold leggings and long johns and things like that,
11 that could be categorized as compression.

12 Q. Were you selling sweatpants in 2007?

13 A. We were selling knit pants, not specifically, like,
14 sweatpants as we know them today. But yeah, we sold knit
15 trousers and knit leggings, yeah.

16 Q. When did Thom Browne first sell sweatpants?

17 A. First offered in 2009.

18 Q. Were you involved in the design of these sweatpants that
19 were first sold by Thom Browne?

20 A. Sure, yeah.

21 Q. And tell us about the design process for the sweatpants.

22 A. So we were -- the company was growing and Thom really
23 wanted to be able to offer the breadth of clothing that we had
24 to our customer in various ways, as opposed to as -- how to
25 explain, like, like a life -- he wanted them to create a

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Childs - Direct

1 lifestyle company of the brand, right. So you could wear it to
2 work, you could wear it on the weekends, wear it when you're
3 lounging, things likes that. So just progressing into those
4 categories.

5 Thom wanted to have a sweat pant that our customer
6 could wear on the weekends, and so he wanted to have it with
7 all the design details of what we were already doing. Our fit,
8 like, the quality. But then also, like, have some irreverence
9 of -- the idea was to create something that fulfilled those
10 boxes.

11 Q. Thank you. Let's look at Exhibit 147, please.

12 What is this document that you're looking at here?

13 A. This is the spring/summer 2010 runway show.

14 Q. What was the theme of this runway show?

15 A. It was a Robinson Crusoe sort of show.

16 Q. If we look at the second page there, if we look at the
17 middle row on the left, first figure there.

18 Can you tell us what this is?

19 A. This is the sweatshirt and sweat trouser, sweat pant.

20 Q. And were these the first sweatpants sold by Thom Browne?

21 A. Yes.

22 Q. And you said this was from the spring/summer 2010
23 collection?

24 A. Yeah.

25 Q. And when did this runway show take place?

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Childs - Direct

1 A. This would have been shown in 2009, September of '09.

2 Q. September '09?

3 A. Yeah.

4 Q. And that is the first public display of sweatpants by
5 Thom Browne?

6 A. Yes.

7 Q. And those bear the four-bar design, correct?

8 A. They do.

9 Q. Were you selling swimwear in 2007?

10 A. Yes.

11 Q. You said you joined the company in 2007.

12 How big was the company in 2007?

13 A. Um, very small. It was maybe 15 people, I want to say,
14 including the store staff. So yeah, quite small.

15 Q. And when you started at Thom Browne, was there a particular
16 type of clothing that Thom Browne was known for at that time?

17 A. Our tailored sportswear it would be.

18 Q. And as you added new lines or new products to your lines of
19 clothing, such as sweatpants, how were they designed to fit in
20 with the collection?

21 A. Um, again, just making sure that the proportions and
22 quality were there. And then also Thom always wanted, like,
23 it's -- he has always said it's such a serious --

24 MR. FLEMMING: Objection, hearsay.

25 THE COURT: Sustained.

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Childs - Direct

1 Q. You're familiar with the branding elements incorporated
2 into your designs for these products?

3 A. Yes.

4 Q. Which are they?

5 A. We have our Grosgrain branding, which is this ribbon here,
6 which is the white/red/blue/white Grosgrain --

7 MR. MALDONADO: Your Honor, can I use this, the
8 demonstrative?

9 THE COURT: Yes.

10 Q. Handing you a demonstrative Exhibit 14, Defendant's
11 Demonstrative 14.

12 Can you tell us what that is?

13 A. This is our white/red/white/blue/white Grosgrain.

14 Q. Is that a product specifically manufactured for Thom
15 Browne?

16 A. This is, yes.

17 Q. What's the material it's made of?

18 A. I don't know specifically, but it's a polycotton blend, I
19 believe.

20 Q. And is the Grosgrain ribbon always in those colors?

21 A. For us, yes.

22 Q. Is that the Grosgrain ribbon you've been using since you
23 were at the company in 2007?

24 A. Yes.

25 Q. You mentioned that you --

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Childs - Direct

1 I'm sorry. Did you mention the four bars?

2 A. No.

3 Q. OK. Are there other branding elements that you use?

4 A. Yes. We use four-bar branding as well as, um, this little,
5 like, laundry tag as well.

6 Q. When you started in 2007, was Thom Browne using the four
7 bands, four bars?

8 A. No.

9 Q. What were they using?

10 A. Three, three bands.

11 Q. Were you involved in the change from three bars to four
12 bars?

13 A. I was.

14 Q. Can you tell us how that came about?

15 A. Yeah. As I mentioned, we worked at the factory on a really
16 small team and --

17 Q. Go ahead.

18 A. And so as we're set up, like, every day, we sat down at the
19 table. And Thom came in one day and told us that --

20 MR. FLEMMING: Objection, hearsay.

21 THE COURT: You can't testify to what anyone else told
22 you, just what you observed and said yourself.

23 THE WITNESS: OK.

24 THE COURT: Sustained.

25 THE WITNESS: So I can't say what someone said?

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Childs - Direct

1 THE COURT: No, you can't.

2 THE WITNESS: OK.

3 THE COURT: So the question was?

4 MR. MALDONADO: Your Honor, I can pose a new question.

5 THE COURT: All right. Why don't you do that.

6 BY MR. MALDONADO:

7 Q. At some point, did you change from three bars to four bars?

8 A. Yes.

9 Q. And what was that design process like?

10 A. Um, we -- I had to change the layout from three to four.

11 It was a lot of trial and error. We were cutting paper,
12 playing with different layouts of the bars on the left sleeves
13 and the left side of the trouser, of different samples that we
14 had at the factory, playing with proportion and spacing and
15 things like that, until we got to somewhere we really liked the
16 look of. And then we would launch a sample.

17 Q. Who decided on the four bars?

18 A. It would have been Thom.

19 Q. During that meeting or the process where you changed from
20 three to four, did you consider other options besides bars?

21 A. Besides bars, no. Because it wouldn't have been true to
22 the original idea of it, which was this varsity-inspired bands
23 along the arm or sleeves of jackets.

24 Q. And in the design process when you were thinking of new
25 ideas, did you have an understanding of any limitations that

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Childs - Direct

1 you had in your design process with respect to the use of bars?

2 A. Well, it had to fit within a certain space. So the
3 limitations were identifiably, you know, where it had to be on
4 the garment and garments. So yeah, the limitations were
5 working within that.

6 Q. Were the limitations on the number of bars you could use,
7 for example?

8 A. Yeah, yes. We couldn't use three.

9 Q. Any other limitations?

10 A. Not that I was told.

11 Q. OK. And in connection with your responsibilities, did you
12 communicate with your factory?

13 A. Yes.

14 Q. Who was your factory at the time?

15 A. Which factory?

16 Q. For your knitwear products?

17 A. The factory we caused was Corgi, it was called.

18 Q. I would like to pull up Exhibit 83, please.

19 Do you recognize this e-mail?

20 A. I do.

21 Q. And in the course of your work in the design team, did you
22 review e-mails between Thom Browne and Corgi?

23 A. Yes.

24 Q. Is this one of the e-mails that you have seen during that
25 time?

NlAsADI1

Childs - Direct

1 A. I have seen this, yes.

2 MR. MALDONADO: OK. Your Honor, I would like to offer
3 Exhibit 83.

4 MR. FLEMMING: No objection.

5 THE COURT: Received.

6 (Defendant's Exhibit 83 received in evidence)

7 Q. What's the date on this e-mail?

8 A. The 1st of April, 2008.

9 Q. And this is an e-mail from Sam Lothrop to Lisa Wood?

10 A. It was.

11 Q. Is this in connection with the change if three bars to four
12 bars?

13 A. Yes.

14 Q. And did Mr. Lothrop convey to Ms. Wood the reason that the
15 change was being made?

16 A. Yes, or he told her we were changing it, yes.

17 Q. And what was the reason?

18 A. Because adidas was threatening us, to sue us.

19 Q. Thank you.

20 If we can move on to Exhibit 146, please.

21 When did Thom Browne first publicize the four bars?

22 A. It was in 2000 -- it was our 2009 show.

23 Q. For which collection?

24 A. I believe this is from spring/summer 2009.

25 Q. And on the screen in front of you, what do you see in front

NlAsADI1

Childs - Direct

1 of you there?

2 A. This is the spring/summer 2009 show.

3 Q. Is this what you referred to as a look book?

4 A. Yeah. This would be a look book of the show.

5 Q. What does that mean?

6 A. Um, a set of images presented to the public of the
7 collection.

8 Q. So these are the items on the runway at the collection for
9 this show?

10 A. Yes.

11 Q. OK. And you said this is a debut of the four-bar
12 trademark?

13 A. This was the first season we debuted the four-bar, yes.

14 Q. If we look at the second row to the leftmost image.

15 Is that the four-bar, the first public display of the
16 four-bar trademark?

17 A. Yes.

18 Q. And when was this show held?

19 A. This show was in 2008, so it would have been the September
20 of '08.

21 Q. And what types of clothing did you use the four-bar
22 trademark on?

23 A. Knitwear, we used it on socks. I believe, at the time, we
24 had it on jackets, knitwear. Did I say that?

25 Q. Did you have it on shirts?

NlAsADI1

Childs - Direct

1 A. I believe so, yes.

2 Q. And did you use it on the same items that you used three
3 bars on?

4 A. Yes.

5 Q. And were the sweatpants available for sale in your TriBeCa
6 store?

7 A. When?

8 Q. In 2010.

9 A. They would have been available, yes, in 2010, yes.

10 Q. And you've been to the TriBeCa store?

11 A. Yes.

12 Q. Did you work out of the TriBeCa store at any time?

13 A. Yeah.

14 Q. And you've seen the sweatpants back in 2010 in the TriBeCa
15 store?

16 A. Yes.

17 MR. FLEMMING: Objection, leading.

18 THE COURT: I'll allow it.

19 Q. I would like to show you Exhibit 896, please.

20 Can you explain to the jury while we're wait for the
21 exhibit, what is the process for manufacturing the sweatpants
22 with the four bars, how did the four bars apply to the
23 sweatpants?

24 A. The original design, and how we still do it today, we
25 engineered the fabric to have the four bars, like, knit into

NlAsADI1

Childs - Direct

1 the fabric itself, instead of applying it on top or printing it
2 or anything like that. It's actually the fabric is woven
3 specifically and engineered specifically to be incorporated
4 within the fabric.

5 MR. MALDONADO: Your Honor, may I approach?

6 THE COURT: Yes.

7 Q. Mr. Childs, are those sweatpants sold by Thom Browne?

8 A. Yes.

9 Q. Can you please hold them up for the jury.

10 Can you please show the jury what you were just
11 describing as to how these stripes are woven into the
12 sweatpants?

13 A. Yes. So you can see that -- I have it inside out, so the
14 stripes are actually visible on the inside as well because of
15 the process that we use. It's knit actually continuously on
16 the knit machines, and then every so often there will be
17 another stripe, so that when we do the grading and the
18 manufacturing, they could cut the four bars specifically where
19 we want them to cut it.

20 Q. Thank you.

21 Are you familiar with adidas' sweatpants?

22 A. Yes.

23 Q. Have you seen them?

24 A. I've seen some, yes.

25 MR. MALDONADO: OK. Your Honor, I would like to

N1AsADI1

Childs - Direct

1 approach the witness, please.

2 THE COURT: Yes.

3 Q. Mr. Childs, handing you Demonstrative Exhibit No. 8.

4 Have you seen those before?

5 A. Yes.

6 Q. Are those the adidas sweatpants?

7 A. They are.

8 Q. And can you please describe how the stripes are applied to
9 those sweatpants?

10 A. So these are --

11 MR. FLEMMING: Objection, 402 and 403.

12 THE COURT: Overruled.

13 A. These are seen on to the surface of the fabric down the leg
14 on both sides, just like how we would call top apply.

15 Q. Thank you.

16 MR. MALDONADO: Your Honor, is it possible to pass
17 these exhibits to the jury so they can see for themselves?

18 THE COURT: Yes.

19 MR. MALDONADO: Thank you.

20 Q. Does Thom Browne apply its stripes the same way as adidas
21 does to the sweatpants?

22 A. No.

23 Q. OK. Let's pull up Exhibit 145, please.

24 Thom Browne participates or holds runway shows,
25 correct?

NlAsADI1

Childs - Direct

1 A. Yes, we do.

2 Q. How many runway shows per year does Thom Browne have
3 presently?

4 A. Two, two per year.

5 Q. Two per year.

6 Are you involved in those runway shows?

7 A. Less so these days, but in the past, a lot more, yeah.

8 Q. What has your involvement been with the runway shows?

9 A. Um, everything from, I mean, getting the samples there and
10 finish on time. And then back when I originally worked there,
11 here at Thom Browne, it was a lot more management backstage,
12 dress, making sure the models were dressed, making sure that
13 they were styled correctly, making sure that they were in the
14 right order for how Thom wanted them to go out to be seen.
15 Yeah.

16 Q. OK. And where are Thom Browne's --

17 Where are the runway shows held, what cities?

18 A. Around the world. We show in New York, Paris, Italy. I
19 think those are the only three countries.

20 Q. That is now, presently?

21 A. Presently, yeah.

22 Q. And when you started back in 2007, 2008, what cities were
23 the runway shows held in?

24 A. In New York.

25 Q. Only in New York?

NlAsADI1

Childs - Direct

1 A. Yeah.

2 Q. OK. In front of you is an exhibit here.

3 Is this a look book from a runway show?

4 A. Yes.

5 Q. Now, which runway show is this?

6 A. This is the spring/summer 2008 runway show.

7 Q. What's the theme for this show?

8 A. This was a surf theme.

9 Q. And does this show include swimwear?

10 A. It does.

11 Q. OK. Let's scroll down to the next page, please.

12 If you want to zoom in on that figure in the lower,
13 next. There is one.

14 Is that part of the collection?

15 A. Yes.

16 Q. If we go to two images to the left there.

17 Is that a swimwear?

18 A. The first one you had was a board short, but this could be
19 worn as one.

20 Q. OK. Let's pull up the next exhibit, please, Plaintiff's
21 Exhibit 1314.

22 Can you tell us which show this is?

23 A. This is the fall/winter 2006 fashion show.

24 Q. OK. What's the theme for this show?

25 MR. FLEMMING: Objection, foundation for this time

NlAsADI1

Childs - Direct

1 period.

2 THE COURT: If you can lay a foundation.

3 Q. Are you familiar with the fall/winter 2006 show?

4 A. I'm familiar with it, yes.

5 Q. Have you seen images from that show?

6 A. Yes.

7 Q. Are the images in this exhibit the images from that show?

8 A. They are.

9 MR. FLEMMING: Objection, cumulative.

10 THE COURT: Overruled.

11 Q. What was the theme for this runway show?

12 A. It's, like, ice skating.

13 Q. OK. If we can pull up the next exhibit, please, 146.

14 Which show is this on the screen?

15 A. This was the spring/summer 2009 runway show.

16 Q. And what was the theme of the spring/summer 2009 runway
17 show?

18 A. It's tennis.

19 MR. FLEMMING: Objection, cumulative.

20 THE COURT: Definitely not.

21 Overruled.

22 A. Tennis, tennis theme.

23 Q. OK. If we scroll down, please. Right there, on the right
24 side, middle right.

25 What is that image what is the model wearing in that

NlAsADI1

Childs - Direct

1 image?

2 A. He's wearing a wetsuit and a terry cloth coat.

3 Q. What material is the wetsuit made of?

4 A. Neoprene.

5 Q. That was in 2009, you said?

6 A. Presented in 2009, yes.

7 Q. Where was that show held?

8 A. That was here in New York.

9 Q. Can we now turn to Exhibit 147, please, and tell me what
10 show this is?

11 A. This is the spring/summer 2010 runway show.

12 Q. What was the theme for this show?

13 A. That was the Robinson Crusoe kind of walk-to-shore show.

14 Q. That is where the sweatpants were debuted?

15 A. Yes.

16 Q. Where was that show held?

17 A. That was in our store downtown in New York.

18 Q. Can we look at Exhibit 140, please.

19 What show is this?

20 A. This is the fall/winter 2010 runway show.

21 Q. Where was that held?

22 A. This was at the Armory Uptown here in New York.

23 Q. What was the theme for this show?

24 A. This was, like, a football kind of rugby theme.

25 Q. OK. If we look at the lower right image on this page, what

NlAsADI1

Childs - Direct

1 do we see there?

2 A. We see a coat and boots.

3 Q. What kind of decoration do we see on this image?

4 A. So this we call this framing, intarsia framing. We take
5 the different color materials and actually seam it into the
6 garment itself, as opposed to a decorative trim, let's say.
7 It's actually woven into -- not woven, but sewn into the
8 garment to become part of the garment, as opposed to a
9 decorative element of the garment.

10 Q. Thank you.

11 If we can pull up Exhibit 153, please.

12 Can you tell us what show this is?

13 A. I believe this is the women's runway show. Season, I think
14 it's 20 --

15 Q. Zoom in on the --

16 A. -- 10? Or is it --

17 Q. -- the date.

18 A. 2011.

19 Q. 2011. Is this the first women's show?

20 A. Yes.

21 Q. Back when you started at Thom Browne, did Thom Browne have
22 a women's collection?

23 A. When I started, the women's selection was very small. I
24 wouldn't call it a complete collection, but we had a women's
25 offering.

NlAsADI1

Childs - Direct

1 Q. Today, do you have a women collection?

2 A. Yes, we do.

3 Q. Are you the design director for that collection?

4 A. Yes.

5 Q. When you started in 2007, did Thom Browne have a children's
6 collection?

7 A. We did not, no.

8 Q. Do you have a children's collection today?

9 A. Yes.

10 Q. Let's look at exhibit -- I'm sorry. This exhibit on the
11 screen was the women's collection. Let's look at 141, please.

12 What show is this?

13 A. This was the fall/winter 2011 men's runway show.

14 Q. If you look at page two.

15 These are items in that collection, correct?

16 A. Yes.

17 Q. Look at the upper left. I'm sorry, first row.

18 Is that the similar intarsia use of the red, white and
19 blue you were talking about?

20 A. Yes. This would be intarsia into the knitwear, like, on
21 the scarf and the cardigan.

22 Q. OK. If we can look at Exhibit 142, please.

23 What show is this?

24 A. This is the fall/winter 2012 men's runway show.

25 Q. What was the theme for this show?

NlAsADI1

Childs - Direct

1 A. It was punk footballer.

2 Q. Let's look at the upper right image there.

3 What do we see here?

4 A. It's, like, a classic rugby stripe, and it has the four
5 bars on his left sleeve and also our Grosgrain used as a chin
6 strap.

7 Q. Thank you. Can we look at Plaintiff's 1314, please. Page
8 35, please.

9 What show is this?

10 A. It's the spring/summer of 2013, men's show.

11 Q. What's the theme for this show?

12 MR. FLEMMING: Objection, 602.

13 THE COURT: Overruled.

14 Q. What is the theme for this show, please?

15 A. I don't know exactly the theme, but I'd say magus whaler.

16 Q. If we look on this page on the screen, do we see the four
17 bars?

18 A. We do, yes.

19 Q. If we look at now -- what's the next one, page 40.

20 What is this show?

21 A. This was another women's runway show.

22 Q. Do you know when this show was held?

23 A. 2013.

24 Q. If we look at page 46. Scroll down.

25 These are items that were sold in 2014, correct?

NlAsADI1

Childs - Direct

1 A. Yes. Oh, they would have been available in 2013.

2 Q. OK. Let's turn now to page 60, please, this same exhibit.

3 Which show is this?

4 A. Men's spring/summer 2015 runway show.

5 Q. What was the theme for this show?

6 A. Um, I think it was, like -- what's the word -- like,
7 robotics, but also, like -- I don't know the word. Anatomy of,
8 like, robotics in a way.

9 Q. If we look at page 62, please. Scroll down.

10 These are various looks in that runway show, is that
11 correct?

12 A. Yes.

13 Q. Let's look now at page 66, please.

14 If you can tell us what show this is?

15 A. This is the women's fall/winter 2016 runway show.

16 Q. If we look at page 68.

17 Do you see the Grosgrain featured in this runway show
18 as well?

19 A. Um-hmm, yes.

20 Q. Now, if we can go to page 70.

21 And tell me what show this is?

22 A. Men's fall/winter 2017 runway show.

23 Q. OK. Switch up to page 74. These are all items within that
24 collection. If we look at the third image on the top line.

25 Can you describe that image there?

NlAsADI1

Childs - Direct

1 A. This is Chesterfield overcoat with, like, elongated
2 sleeves. And then anywhere you would have a seam it was
3 buttoned. It was all buttoned together.

4 Q. OK. If we can turn now to page 75.

5 What show is this?

6 A. This was the fall/winter 2022 runway show.

7 Q. OK. If we jump to page 78, please.

8 On the bottom row there, second image, you see the
9 four bars?

10 A. Yes.

11 Q. Now if we can turn to page -- I'm sorry -- to Exhibit 144,
12 please.

13 Which show is this?

14 A. It's the fall/winter of 2018 runway show.

15 Q. And on the first page there, do we see, is that one of your
16 down jackets?

17 A. This is a down coat, yes.

18 Q. And do you see the four bars on the sleeve there?

19 A. Yes.

20 Q. So throughout the runway shows that we just looked at from
21 2007 through 2018, did Thom Browne consistently display apparel
22 feature the four bars?

23 A. Yes.

24 Q. And did Thom Browne consistently display apparel featuring
25 the Grosgrain signature?

NlAsADI1

Childs - Cross

1 A. Yes.

2 Q. And all the time you've been at Thom Browne, have you ever
3 been made aware of any instances of consumers, confused between
4 Thom Browne's products and adidas' products?

5 A. I have not, no.

6 MR. MALDONADO: Thank you.

7 I pass the witness.

8 THE COURT: Cross-examination.

9 CROSS-EXAMINATION

10 BY MR. FLEMMING:

11 Q. Mr. Childs, you started working for Thom Browne in 2007,
12 correct?

13 A. Yes.

14 Q. And when you started in 2007, your impression of the Thom
15 Browne brand was impeccably tailored clothing, is that right?

16 A. Yes.

17 Q. And back in 2007, Thom Browne made what you described as
18 subtle nods to athletic-wear?

19 A. Yes. There was always an element of sports in the
20 collection, yes.

21 Q. Let's bring up Exhibit 1319 already in evidence.

22 These items we're looking at are actual athletic-wear,
23 correct?

24 A. I can't -- I don't know.

25 Q. You don't know?

NlAsADI1

Childs - Cross

1 A. I mean...

2 Q. Are you head of design for womenswear at Thom Browne?

3 A. Yes.

4 Q. And these are women's clothing?

5 A. This is on a woman, yeah.

6 Q. And this is active-wear, correct?

7 A. Um, I mean, these are our compression, like, top and
8 trouser.

9 Q. Released in 2020, correct?

10 A. I'm not sure when it was released.

11 Q. So back in 2007, you testified that Thom Browne was using a
12 three-bar design, is that correct?

13 A. Yes.

14 Q. And you personally didn't have any interactions with adidas
15 during that time?

16 A. I did not, no.

17 Q. But Thom Browne decided to switch from three bars to four
18 bars, right?

19 A. In 2008, yes.

20 Q. And you were part of those discussions?

21 A. Yes.

22 Q. As far as timing, it actually took less than a month to
23 come up with the four bars review samples and make a decision?

24 A. Our process was within a month, yes.

25 Q. And Mr. Browne made the ultimate decision?

NlAsADI1

Childs - Cross

1 A. He would have, yes.

2 Q. And at that time Thom Browne was not making sweatpants, is
3 that what you testified?

4 A. We were making sweat pant-type things, like, knit trousers,
5 yeah, so...

6 Q. So to you, knit trousers are the same thing as sweatpants?

7 A. Not as maybe we all know them, but, I mean, they are casual
8 pants, yeah.

9 Q. And I want to talk about the Grosgrain for just a bit.

10 Thom Browne doesn't have any written guidelines for
11 how the Grosgrain should appear on clothing, correct?

12 A. We might have a brand book that has it, yeah.

13 MR. FLEMMING: Can we show just the witness and the
14 court page 56 of the transcript going into page 57.

15 Page 56 of the transcript going into page 57, just
16 show the witness and the Court.

17 I'm looking at page 56, starting at 22, Nita, so keep
18 going.

19 THE COURT: I'm sorry, to where?

20 MR. FLEMMING: Keep scrolling, please, to the bottom.
21 Starting at line 22 of 56 and going through line four
22 of 57.

23 Permission to impeach.

24 MR. MALDONADO: Objection, your Honor.

25 THE COURT: Let me see the whole thing.

N1AsADI1

Childs - Cross

1 I don't think it's inconsistent. Overruled.

2 BY MR. FLEMMING:

3 Q. So really it's up to just Mr. Browne to decide --

4 THE COURT: I'm sorry. I said overruled. I meant
5 sustained.

6 MR. FLEMMING: Understood, your Honor.

7 Q. So really it's just up to Mr. Browne to decide how the
8 Grosgrain is to appear on clothing?

9 A. Yes.

10 Q. And Thom Browne uses the Grosgrain horizontally on sleeves,
11 is that right?

12 A. We have, yes, we do.

13 Q. And also vertically down sleeves?

14 A. We do, yes.

15 Q. And diagonally across shirts?

16 A. Yes.

17 Q. And vertically down shorts, too, right?

18 A. Yes.

19 MR. FLEMMING: Let's bring up just for the witness
20 Exhibit 884.

21 We offer this Exhibit into evidence.

22 MR. MALDONADO: No objection.

23 THE COURT: Received.

24 (Plaintiff's Exhibit 884 received in evidence)

25 MR. FLEMMING: We can publish that to everyone.

NlAsADI1

Childs - Cross

1 BY MR. FLEMMING:

2 Q. Mr. Childs, this is a Thom Browne brand book, correct?

3 A. It just says Thom Browne. I don't know.

4 Q. Let's go to the second page. One more.

5 You recognize this as a brand book, correct?

6 A. It's called a brand book, yes.

7 Q. Let's turn to page five, please.

8 In the next to last paragraph, do you see a reference
9 to an award in 2017?

10 A. 2017, yes.

11 Q. So it's fair to say that this brand book was written
12 sometime in 2017 or later?

13 A. After 2017, I mean, around or after 2017, sure.

14 Q. Let's turn to page four.

15 And this page starts the brand identity section of
16 this Thom Browne brand book?

17 A. Oh, yes. I'm sorry, yeah.

18 Q. Yes. Let's go to page nine next.

19 A. Sorry.

20 Q. Do you see there on the right side of the page where it
21 says in all caps four-bar stripe?

22 A. Yes.

23 Q. And do you see just below that where it says, a brand
24 standard inspired by the classic look of arm band stripes on
25 collegiate athletics sweaters?

NlAsADI1

Childs - Cross

1 Do you see that?

2 A. Yes.

3 Q. And there are no sweaters accused in this case, correct?

4 A. I don't know.

5 Q. On the next page, page ten. It may be the next page.

6 There we go.

7 This page describes the Thom Browne uniform, correct?

8 A. The basic, yes, basic uniform, yes.

9 Q. And the first items are a gray tie, silver tie bar, and
10 white pocket square, correct?

11 A. Yes.

12 Q. Do you see underneath that where it refer to the RWB
13 stripe.

14 Does that refer to red, white and blue Grosgrain?

15 A. Below, the first sentence there?

16 Q. Below the words pocket square in all caps.

17 A. The enamel stripe, yes.

18 Q. So the RWB stripe is the red, white and blue Grosgrain
19 design?

20 A. Not as it refers to here.

21 Q. So there is a difference between the red, white and blue
22 stripe and what you call the white/red/white/blue/white design
23 earlier, is that what I'm hearing?

24 A. No. Just different application, I guess, is what I'm
25 saying.

NlAsADI1

Childs - Cross

1 Q. So the Thom Browne uniform also includes a gray cardigan,
2 correct?

3 A. Yes.

4 Q. There are no cardigans accused of infringement in this
5 case?

6 A. I'm unsure.

7 Q. And it also includes a white Oxford shirt?

8 A. Um-hmm yes.

9 Q. And you're not aware of any Oxford shirts being accused of
10 infringement in this case?

11 A. I don't know, no.

12 Q. So you left Thom Browne in 2011, correct?

13 A. I did.

14 Q. And your involvement between 2011 and 2019 just included a
15 few freelance projects?

16 A. Um, I -- I went and worked for a couple other brands and
17 started my own brand in between.

18 Q. Let's bring up Defendant's Exhibit 460, which you looked at
19 earlier.

20 You described this as a list of Thom Browne's
21 products, product offerings in 2007?

22 A. Yes.

23 Q. And the date is January 6, 2007, right?

24 A. Yes.

25 MR. FLEMMING: All right. Let's go to the last page

NlAsADI1

Childs - Cross

1 of this document.

2 This should be published for everyone, Nita, it's
3 already in. I don't think you missed anything.

4 Q. We're looking at the last page, right?

5 A. If you say so, yeah, I guess. Yes.

6 Q. So this is a 30 --

7 A. Yeah, yeah.

8 Q. This is a 36-page document?

9 A. Yeah. It was just zoomed in, I should say. Yes.

10 Q. Let's go back to the first page.

11 I counted about 51 entries per page, is that fair to
12 say, each page lists approximately 50 products?

13 A. Um, I could count them. Yeah. Yes, if you say so.

14 Q. There's some highlighting in this document.

15 Did you see that when you were reviewing it?

16 A. I don't remember. I don't recall.

17 MR. FLEMMING: Let's slowly scroll through all the way
18 to page 25, please.

19 Maybe not too slowly. Sorry, everybody.

20 Q. Do you see the highlighting on this page?

21 A. I do.

22 Q. Do you know why it's there?

23 A. I do not.

24 Q. Do you know what cotton sheer means?

25 A. That would reference to a shirting fabric.

NlAsADI1

Childs - Cross

1 Q. A shirting fabric.

2 So what would this shirt look like? Is it, like, a
3 button-down?

4 What is it?

5 A. Yeah, like an Oxford -- sheer would be a sheer cotton, and
6 it would have quad stripes on it, so four stripes.

7 Q. What are quad stripes?

8 A. Um, four stripes.

9 Q. But that's not the four bars?

10 A. No, like a striped shirt.

11 Q. Because this was in 2007 and the four bars weren't adopted
12 until 2008, right?

13 A. Yes.

14 Q. OK. So let's go to page 28, where there is more
15 highlighting.

16 What's highlighted here are cashmere V-neck pullovers,
17 correct?

18 A. Yeah, pullovers.

19 Q. And you wouldn't describe cashmere V-neck pullovers as
20 active-wear, right?

21 A. No.

22 Q. Let's go to page 32. You see more highlighting, and they
23 are all for knit cardigan sweaters, is that right?

24 A. Yes, looks to be knit.

25 Q. Like the one that was held up just a few minutes ago?

NlAsADI1

Childs - Cross

1 A. Um, I didn't see a cardigan.

2 Q. A cardigan was not held up for you?

3 A. No.

4 Q. Let me hold it up again and see what product you're talking
5 about.

6 MR. FLEMMING: Thank you, Charlie.

7 Q. Is that not a cardigan sweater?

8 A. That is, yes.

9 Q. So Thom Browne was swelling cardigan sweaters in 2007,
10 right?

11 A. Yes.

12 Q. But that's not active-wear, right?

13 A. Not as we know today, no.

14 Q. And you're not aware of adidas accusing any cardigan
15 sweaters of infringement?

16 A. Not that I know of.

17 MR. FLEMMING: No further questions.

18 THE COURT: Any redirect?

19 MR. MALDONADO: No, your Honor.

20 THE COURT: Thank you very much. You may step down.

21 (Witness excused)

22 All right. We'll take our midmorning break at this
23 time.

24 (Continued on next page)

NlAsADI1

Childs - Cross

1 (Jury not present)

2 THE COURT: There was another dispute that plaintiff's
3 counsel said he wanted to bring to my attention.

4 MR. HENN: Yes, your Honor.

5 So you will recall that we had an expert,
6 Dr. D'Arienzo, who the court opted to exclude from testifying
7 on the grounds that although he had lots of experience in the
8 fashion industry, he did not adequately engage in what you
9 deemed as a scientific method to review a bunch of stripes
10 designs and opine on what impact that would have to consumers.

11 THE COURT: Not a scientific method, but a Rule 702
12 methodology.

13 MR. HENN: Fair.

14 Defense intends to introduce testimony from
15 Ms. Arbuckle, and we moved in limine on a number of issues.
16 And your Honor, at the outset of the case, before you had ruled
17 on Dr. D'Arienzo's testimony, you said that she should be
18 permitted to testify as to the existence of three stripes --
19 excuse me -- striped products being in the marketplace.

20 We believe in light of the ruling on Dr. D'Arienzo,
21 given that Ms. Arbuckle did nothing more than go on the
22 Internet and pull pictures of stripes, she should not be able
23 to offer any expert testimony on what is purely a factual
24 issue, are there stripes out there.

25 And further, she admits that she has no information at

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1 all about the scope of sales of any of those products. So even
2 if you were to allow her to come in, I guess, as a fact witness
3 to say, I found out of these things, she admitted without
4 qualification in her deposition that she has no support for the
5 extent of any of this stuff being sold.

6 And so we would ask that she be excluded, and to the
7 extent you have any doubts, we would suggest you ask her
8 similar questions to what Dr. D'Arienzo was asked and confirm
9 she did nothing more than just go on line and pull a bunch of
10 stripes.

11 MR. MALDONADO: Your Honor, first, as an initial
12 matter, this is the arguments that were already raised and
13 brought to the court's attention in connection with the
14 Daubert, as well as to exclude evidence of third-party use.

15 So I believe the court has ruled --

16 THE COURT: So let me mention -- and there is no way
17 the court reporter will be able to fairly pick this up -- but
18 although it is spelled D-a-u-b-e-r-t, Mr. Daubert pronounces
19 his name Daubert, not Dau-bear.

20 Now that we have that corrected, go ahead.

21 MR. MALDONADO: We believe these arguments were
22 already made in connection with plaintiff's Daubert motion as
23 wells as the evidence to third-party use the court has already
24 ruled on.

25 Secondly, I don't believe that Ms. Arbuckle's

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1 testimony is in any way limited by the court's ruling as to
2 Mr. D'Arienzo. I think that the evidence and the impact of
3 third-party use on the issues in this case are independent of
4 whatever opinion that Mr. D'Arienzo would have offered if he
5 were on the stand.

6 Ms. Arbuckle has extensive experience in fashion
7 history. She will testify that not only as to -- she will
8 testify as to how designers view evidence of third-party use in
9 the marketplace, how it affects the designing process, and how
10 that comes to bear on the issues in this case.

11 We believe that, you know, as the court permitted, she
12 would testify as to third party use. If she were permitted to
13 so testify, as our case was guided by that rulings, obviously,
14 and we don't see any reason that she should be excluded at this
15 point.

16 THE COURT: All right. I want to go back and look
17 again at my own notes, so we'll take this up at the next break.

18 It doesn't look like we'll get to her before the next
19 break.

20 MR. MALDONADO: OK, your Honor. Also, I believe the
21 plaintiff rested their case, so we have a motion.

22 THE COURT: Have we now completed the witnesses that
23 you were going to call?

24 MR. HENN: We have, your Honor. The plaintiff rests.

25 THE COURT: Go ahead.

1 MR. MALDONADO: OK, your Honor.

2 The defendant moves for judgment as a matter of law
3 under Rule 58 on all adidas' claims under the Lanham Act, New
4 York law, and the common law. More specifically, we move on
5 the following issues and claims:

6 The first is no willfulness or bad faith. Thom Browne
7 moves for JMOL under 50(a) as adidas has failed to present
8 legally sufficient evidence of bad faith or willfulness in
9 order to prove bad faith infringement or dilution. Adidas
10 needs to show that Thom Browne adopted the accused marks with
11 bad faith or a predatory intent --

12 THE COURT: Let me just cut you off for a second
13 because I do think there is a serious issue -- I'll hear from
14 plaintiff's counsel in a second -- as to where there is
15 sufficient evidence to go to the jury on the question of
16 willfulness or bad faith. But that does not eliminate any of
17 the claims, that just eliminates one of the issues relevant to
18 the claims.

19 MR. MALDONADO: Correct. That is one of the items on
20 their verdict form as for a finding of willfulness.

21 THE COURT: My verdict form, I'll tell you in advance,
22 is going to be three lines.

23 On the claim of infringement, do you find the
24 defendant liable or not liable?

25 On the claim of dilution, do you find the defendant

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1 liable or not liable?

2 If you find liability, how much do you award in
3 damages?

4 And I guarantee you that will be the verdict form, so
5 you don't need to worry about that. But it is still relevant.
6 You're entitled to have issues excluded even if they don't
7 exclude entire claims.

8 MR. MALDONADO: Right.

9 THE COURT: I do think there is a serious issue as to
10 any evidence of willfulness or good faith, but go ahead and
11 complete your...

12 MR. MALDONADO: Certainly, your Honor.

13 There is simply no evidence presented of bad faith
14 adoption of the plaintiff's trademark. The evidence is that
15 plaintiff adopted its trademark, it's original three bars as a
16 varsity reference, switched to four bars in response to adidas'
17 claims --

18 THE COURT: Right.

19 Is there anything else you want to single out in
20 addition to the willfulness?

21 MR. MALDONADO: Yes. Sorry, we have other issues.

22 The second issue is on damages. There was a request
23 in this case for punitive damages.

24 THE COURT: Yes, I do want to hear, of course, from
25 plaintiff's counsel. I think the likelihood of my allowing

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1 punitive damages to go to the jury is, at my present thought
2 about it, is zero.

3 But we'll see what plaintiff's counsel has to say.

4 MR. MALDONADO: OK. Your Honor, the next issue that
5 we have is discouragement of profits and actual damages. Our
6 argument here, your Honor, is that adidas has not presented a
7 legally sufficient case or a legally sufficient evidence to
8 meet its burden to show its entitlement to damages,
9 particularly discouragement of profits under the decision in
10 *Romag Fasteners v. Fossil*, the Supreme Court's decision.

11 Thom Browne further moves on adidas' claim of a
12 reasonable royalty, as the Lanham Act does not support the
13 awarding of a reasonable royalty as a proxy proven actual
14 damages in a trademark case, because this is not a case of a
15 holdover licensee or franchisee situation. There was no actual
16 license agreement between the parties, and Thom Browne never
17 actually used adidas' marks only in allegedly confusingly
18 similar marks.

19 THE COURT: All right. So I'm going to want to hear
20 responses on all of this.

21 MR. MALDONADO: I have --

22 THE COURT: You have more?

23 MR. MALDONADO: I do have more. Sorry, your Honor.

24 THE COURT: Silly me.

25 MR. MALDONADO: We also move on the issue that there

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1 is no -- on the issue of initial interest and post-sale
2 confusion. There has been no evidence presented of initial
3 interest confusion, and the point-of-sale confusion, we
4 believe, is inapplicable in a case such as this, where the
5 allegedly infringing product is of superior quality as opposed
6 to an inferior quality.

7 THE COURT: Maybe I misunderstood. I thought they
8 were not claiming point of sale?

9 MR. MALDONADO: Post-sale. I meant post-sale, your
10 Honor.

11 THE COURT: Sorry.

12 MR. MALDONADO: We don't believe that a post-sale
13 confusion theory is applicable in a case such as this, where
14 the accused product is of a far superior quality than the
15 plaintiff's product, and there is no possibility of harm to
16 adidas even if there were confusion in a post-sale context.

17 With respect to the unregistered marks, common law
18 marks that they assert, we move for a judgment on that as well.
19 We don't believe that adidas has proven any rights to any marks
20 beyond what is cited in their registrations, and they haven't
21 proved that they own any common law rights that extend beyond
22 those marks.

23 As to dilution --

24 Sorry, one last thing on confusion. We don't believe
25 that they presented any evidence of confusion as to any of

1 their claims, so we move on that basis as well.

2 Then finally, as to dilution, we believe that their
3 dilution claims fail as a matter of law because the products
4 here are related products. Dilution is intended to apply where
5 two parties are selling unrelated goods and the use of the mark
6 on unrelated goods dilutes the distinctive quality of the
7 trademark. That is not the case here. The parties sell
8 related goods, and so we believe that the dilution claim fails
9 as a matter of law.

10 Then finally, your Honor, we feel that they proved to
11 prove fame with respect to the dilution claim. Adidas needs to
12 show fame at the time Thom Browne adopted its marks, its
13 Grosgrain in 2005, its four-bar signature in 2009. We believe
14 that there is insufficient evidence of these marks having
15 acquired fame prior to those dates, there is no evidence of
16 sales prior to those dates, and no marketing and advertising
17 activity that would support their claim.

18 For these reasons, we believe that we are entitled to
19 judgment on that claim as well.

20 THE COURT: OK. So I'm very glad we were moving so
21 swiftly this morning, and I want to continue that. So rather
22 than hear from plaintiff's counsel now, we'll find a place
23 later in the day to hear from defense counsel on those various
24 points. So take five more minutes and then we'll resume.

25 (Recess)

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1 MS. SAYOUR: The defense calls Lucas Langellier.

2 (Jury present)

3 THE COURT: While you were out, they called this
4 witness so you can just swear him in. He hasn't been sworn in
5 yet.

6 LUCAS LANGEILLIER,

7 called as a witness by the Defendant,

8 having been duly sworn, testified as follows:

9 BY MS. SAYOUR:

10 DEPUTY CLERK: State your name and spell it slowly for
11 the record.

12 THE WITNESS: Lucas Langellier. L-A-N-G-E-L-L-I-E-R.

13 THE COURT: What's your first name.

14 THE WITNESS: Lucas.

15 BY MS. SAYOUR:

16 Q. Good morning, Mr. Langellier?

17 A. Good morning.

18 Q. Can you please introduce yourself to the ladies and
19 gentlemen of the jury?

20 A. Yes. I'm Lucas Langellier. I am vice-president of retail
21 for Thom Browne. I've been with the company since
22 January 2010.

23 Q. So you've been with the company for about 13 years?

24 A. Yes.

25 Q. When did you start with Thom Browne?

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1 A. So I started I guess 13 years ago almost to the day.

2 Q. January?

3 A. Yes.

4 Q. In January 2010, what position did you hold with Thom
5 Browne?

6 A. I started with sales in the Tribeca in New York.

7 Q. Can you take us through your positions at Thom Browne,
8 starting in 2010 and just give us the titles and the years?

9 A. Yes, so I started in sales in 2010 in the New York store.
10 In 2011 I became store manager. In 2012 I became director of
11 retail for globally, and then I was also in charge of
12 ecommerce. And in 2017 I was promoted to vice-president of
13 retail overseeing global sales for retail.

14 Q. And vice-president of retail is your current title?

15 A. That is correct.

16 Q. When you began working for Thom Browne in 2010, where did
17 you work?

18 A. In New York in the Tribeca store.

19 Q. And where is that store located?

20 A. 100 Hudson Street.

21 Q. So if I call the store the Tribeca store during this
22 testimony, you'll understand that I'm referring to that store?

23 A. Yes.

24 Q. What were your primary responsibilities in 2010 at the
25 Tribeca store?

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1 A. So in 2010, as we were a very small company, we all wore
2 many hats. So while I was in charge of sales, I also helped
3 run the store, so that would include all of operations,
4 merchandising, visual merchandising, and then of course
5 customer service.

6 Q. You mentioned visual merchandising, right?

7 A. Yes.

8 Q. What do you mean by that?

9 A. So visual merchandising is when a store gets a new
10 shipment, you rotate the merchandise throughout the store. So
11 as we have very little foot traffic in this location, we always
12 wanted the store to be fresh and new every time a customer
13 would come back so that if they had alterations, let's say, ten
14 days, when they would come back, you would want the newest
15 arrivals out.

16 Q. Did you have any responsibilities relating to the products
17 themselves?

18 A. Yes. I would also have been in charge of training, and we
19 would all sit through product knowledge, so I was very versed
20 in that part of the product as well.

21 Q. What were your responsibilities as, I guess was it,
22 director of retail, the second position you took on?

23 A. That is correct.

24 Q. What were your responsibilities in that role?

25 A. So in 2011 and '12 we started expanding into Asia Pacific.

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1 We opened three stores in Japan and two in Korea. So I oversaw
2 those stores as well as the New York store.

3 Q. How did your responsibilities change when you became VP of
4 retail at Thom Browne?

5 A. Again, this was a time where we continued to expand into
6 new markets, and we had as a CEO at the time -- so in 2017 when
7 I was promoted to vice-president of retail under Rodrigo Bazan,
8 we started expanding further and therefore my job was to -- to
9 take our business in New York and expand it throughout the
10 world specifically China, Japan.

11 Q. So I know we've been talking a little bit about the Tribeca
12 store, right? Had there always been one store for Thom Browne?

13 A. In 2010, there was one store. Today we have many more
14 stores.

15 Q. How many stores do you have today?

16 A. Today we have a hundred stores approximately, 70 of which
17 are all under my umbrella.

18 Q. I want to be clear when you're talking about stores, are
19 you talking about all the stores where Thom Browne products are
20 located in or --

21 A. No, I'm talking about retail Thom Browne stores. There is
22 another avenue of sales, and that would be through wholesale
23 partners which would be department stores.

24 Q. Okay. So maybe we can back up a little. How does Thom
25 Browne sell its clothing?

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1 A. So we have three main avenues: One which is retail, our
2 own brick-and-mortar stores. The second would be ecommerce,
3 which we run a global ecommerce site. And then the third would
4 be through wholesale, which is department store business.

5 Q. About how many retail locations are there today in the
6 United States?

7 A. Approximately 400 doors.

8 Q. Is that for retail?

9 A. No, that would be for the wholesale business.

10 Q. For retail, about how many --

11 A. Retail is one hundred.

12 Q. And in the United States, how many retail locations are
13 there today?

14 A. Today in the United States there's five.

15 Q. And where are they located?

16 A. We have two in California, San Francisco, Orange county.
17 We have Miami, Florida. We have New York, New York, of course.
18 And we have Boston, Massachusetts.

19 Q. Do you know when those locations each opened up?

20 A. Yes. So New York opened in 2007, followed by Miami in
21 2016. 2020 would have been South Coast Plaza. And just
22 recently Boston and San Francisco.

23 Q. I think you mentioned there are 400 doors. Is that what
24 you said earlier when we were talking about wholesale?

25 A. Yes. So I say doors because Saks Fifth Avenue or at the

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1 time prior to when we were selling at Barneys, those are big
2 retailers, but they have many doors within their company.

3 Q. When you started with Thom Browne, did you have any
4 responsibilities with respect to wholesale?

5 A. I did help the wholesale team, yes.

6 Q. How did you help them?

7 A. During sales appointments, we -- like I said before, the
8 company was quite small, so everybody chipped in to help at
9 these times. So after a fashion show, we sell the collection
10 to wholesale doors, and we do the buying for our retail doors.
11 So I would participate in the sales after the fashion shows.

12 Q. Let's talk a bit about retail. If we can bring up
13 Plaintiff's Exhibit 175, please. It's already admitted. And
14 we can jump to page 2.

15 Mr. Langellier, do you recognize that photograph?

16 A. So this would have been a photograph of the New York store
17 in, I would say, probably 2007 or '8.

18 Q. Is this what the store looked like when you started working
19 there in 2010?

20 A. It did.

21 Q. And can you describe what you see in that photograph?

22 A. So here we have a gray vinyl sports coat. We have some --
23 a navy blue tipped jacket. Then on the coffee table there, you
24 can see some folded knits.

25 Q. What about the store today, does it still look like this?

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1 A. It definitely still resembles this. However, in 2016 we
2 did remodel and expand when we added a women's store to this
3 same location.

4 Q. Now, you talked earlier about visual merchandising. Do you
5 remember that?

6 A. Yes.

7 Q. Can you describe how you visually merchandised this store
8 with reference to the photograph?

9 A. Yes, so, again, because the store holds approximately 100
10 to 125 different SKUs, and what I mean by how many items go on
11 each rack, the store buy and the inventory of the store at this
12 time was probably 2,500. So those items would have been in
13 what we call the back of house. So we each probably two-week
14 period, we would change bringing out what's in the back and
15 replenishing from the sales floor which would change the
16 appearance of the store.

17 Q. You referred to a number 2,500?

18 A. Yes.

19 Q. What were you referring to?

20 A. Units of merchandise within the store.

21 Q. How big was the store?

22 A. 2,000 square feet.

23 Q. How would you compare the Thom Browne Tribeca store to a
24 department store?

25 A. The Thom Browne store, I mean, first and foremost it's our

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1 own environment which is the concept of the store being gray
2 marble with terrazzo floors just to start with. We also carry
3 a much larger collection and offering than a department store.

4 Q. Can you describe how a sales associate would interact with
5 a customer who walked into the Tribeca store?

6 A. Yes. So we try to -- we strive to give the best customer
7 service possible. With that being said, we greet customers.
8 We ask a lot of questions, and we do that because we know that
9 we have limited merchandise on the sales floor, and we have a
10 lot more items in the back. What we're trying to do is we're
11 trying to build a relationship with the customer.

12 Another point of what we try to do is get to know
13 exactly what they are really looking for so that we can bring
14 out additional items to show them

15 Q. Were there expectations for sales associates that worked at
16 the Tribeca store in 2010?

17 A. Yes, there were expectations.

18 Q. What were those expectations?

19 A. It started with giving the best customer service possible
20 to build a relationship with our customer who walks in and also
21 be able to reach out to that customer thereafter.

22 Q. Were they required to interact with the customer?

23 A. Yes.

24 Q. So would you say it would be standard practice at Thom
25 Browne in 2010 to interact with a customer that walked into the

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1 store?

2 A. Absolutely. And it's still the same today.

3 Q. And why is that?

4 A. How we grow a business is in two ways. It's new clients,
5 which is probably 50 or 60 percent of our business, but we as
6 leaders really try to grow and continue to build a relationship
7 with our current clients, and we do that by getting to know
8 them, getting to know what they're looking for, and continue to
9 help them season after season.

10 MS. SAYOUR: Your Honor, I have some binders I think
11 that would help given some of the volume of the exhibits, if I
12 can approach the witness with those binders.

13 THE COURT: All right.

14 Q. Thank you. I'd like to talk a little bit about the
15 product. Which Thom Browne collection was available for
16 purchase at the Tribeca store when you started in 2010?

17 A. So that would have been our spring/summer 2010 collection.

18 Q. And what specific kinds of apparel were displayed in the
19 Tribeca store in 2010?

20 A. As a flagship store, we carry a large collection of what
21 was on the runway, which also has more commercial items that
22 support the runway items. So that would be tailoring from
23 suiting to overcoats and outerwear to Oxford shirting, polos,
24 T-shirts, jersey, shoes, predominantly leather-soled shoes,
25 ties, kind of the whole collection that you would see, an

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1 overall assortment.

2 Q. Was apparel featuring the 4-Bar signature displayed in the
3 store in 2010?

4 A. Yes.

5 Q. What kinds of apparel featuring the 4-Bar signature were
6 displayed in the store in 2010?

7 A. So from the time I started, we put 4-Bar apparel or stripes
8 on a lot of different apparel. So in the picture you'd shown
9 earlier, there was a jacket but we also have T-shirts, polos,
10 sweats, both tops and bottoms, that would have a 4-Bar insignia
11 on the left-hand side.

12 Q. Were sweatpants featuring the 4-Bar design displayed on the
13 store shelves in 2010?

14 A. They would have been.

15 Q. And what about apparel featuring the Grosgrain ribbon
16 signature, would that also have been displayed in the store in
17 2010?

18 A. Yes.

19 Q. I'd like to put up, which I believe is in evidence,
20 DTX-147. Are you familiar with this document?

21 A. So this is -- yes, I am.

22 Q. Can you describe it?

23 A. This is a lookbook from the spring/summer 2010 collection.

24 Q. And if we can turn to page 2, can you describe the look
25 that's in the first image in the middle row?

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1 A. So that would be look nine of the spring/summer 2010
2 collection, which this show was in our New York Tribeca store.
3 What the gentleman is wearing is a khaki Macintosh overcoat
4 tipped with gray Grosgrain, cotton loopback sweatpants with
5 4-Bar insignia on the left leg and also a cotton loopback
6 sweatshirt underneath the jacket.

7 Q. Would the cotton loopback sweatshirt also have the 4-Bar
8 signature?

9 A. It would have.

10 Q. Now, what is this document exactly?

11 A. So, a lookbook is somewhat just that. There's a line of
12 photographers at the end of a runway, and they're all taking
13 photos for major publications, so *Vogue* or *GQ*. We also have a
14 photographer there that's taking pictures for Thom Browne. We
15 use these lookbooks in several ways. First, to communicate to
16 our own customers, but also for always -- coming back to
17 identify the looks that come down the runway. So we use it as
18 a selling tool, both printed and digitally.

19 Q. So it's called a lookbook, right?

20 A. That is correct.

21 Q. So is it a book?

22 A. Yes, it can be a book. In these days, it was definitely a
23 book.

24 Q. And what would be the purpose of the book?

25 A. So for product information, for visual merchandising, for

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1 sending to customers, but also it is just our reference of that
2 show.

3 Q. Were physical lookbooks available in the Tribeca store?

4 A. Yes, physical and then digitally on our ecommerce website.

5 Q. And that would be every year that there was a lookbook?

6 A. Every year, yes.

7 Q. Or actually every season there was a lookbook?

8 A. Correct. Sometimes four times a year.

9 Q. So were the clothing items that this model is wearing in
10 what you referred to as look nine, were those offered for sale
11 in the Tribeca store in 2010?

12 A. Yes, they were.

13 Q. Can you describe how it goes from a look like this from the
14 runway into the Tribeca store?

15 A. So Thom designs outfits, and we try to visualize visual
16 merchandise in outfits as well. So this would have been shown
17 in our New York Tribeca store as an outfit. So it would have
18 been with the sweatpants, sweatshirt and the overcoat.
19 Somewhat what we call stacks together.

20 Q. Did you purchase these products or these looks for the
21 Tribeca store in 2010?

22 A. Yes, we did.

23 Q. Can you describe that process of purchasing the products in
24 2010?

25 A. Yes. So after a runway show, we have a market, and the

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1 market is for all store buyers and also wholesale buyers, which
2 is department stores, to come and view the collection and place
3 orders. That's where we would have seen the assortment and
4 made the buy, what we call.

5 Q. I'd like to show you the next exhibit, which is not in
6 evidence yet, it's DTX-95.

7 MS. NELSON: No objection.

8 THE COURT: Received.

9 (Defendant's Exhibit 95 received in evidence)

10 Q. Mr. Langellier, can you describe this document?

11 A. So this is what we refer to as a line sheet which we use
12 after a runway show to differentiate the product shown.

13 Q. What is a line sheet?

14 A. So a line sheet breaks down the product from the style
15 number, what the content of the product is, it gives a
16 description and it gives sizing and retail and wholesale
17 pricing.

18 Q. If we can turn to page 3 of this document, please. If we
19 can enlarge the top two. Do you see that?

20 A. Yes.

21 Q. Is that look nine that we were just talking about earlier?

22 A. That is.

23 Q. Can you explain what's shown in that?

24 A. So this line sheet is actually very helpful because what we
25 did at the time was take the runway look and match it next to

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1 the item with all the content of this. So this shows look
2 number nine, the sweatshirt, the content of it, the style
3 number, the sizing, and what this particular store had placed
4 as far as the quantities.

5 Q. And what collection is this from?

6 A. This would have been spring/summer 2010.

7 Q. If we can go to pages 12 and 13. Can you describe what's
8 in the lower right-hand image and the upper left-hand image on
9 those side-by-sides?

10 A. So these are sweat shorts and cotton loopback fabric with
11 the 4-Bar on the left side and also a zip-up hooded sweatshirt
12 in gray with the 4-Bars again on the left-hand arm.

13 Q. Were these items available at the Tribeca store in 2010?

14 A. Yes, they were.

15 Q. And what about 2011?

16 A. Yes, they were available in 2011, and they're available
17 today, a version of them. There's been an evolution but the
18 same product.

19 Q. And is that the same thing for the -- on page 3 the
20 sweatpants and the sweatshirt that we looked at?

21 A. That is correct.

22 Q. So these items have been sold at the retail store the
23 entire time you've been at the company?

24 A. Yes, they have.

25 Q. Now, how would, I guess, these items have been displayed in

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1 the Tribeca store in 2010?

2 A. So they would have been displayed in two ways. We have
3 hanging, like rolling racks on hangers of merchandise, and we
4 also have shelving units we call etageres that also display
5 merchandise. So one of the two ways they would have been
6 displayed.

7 MS. SAYOUR: If we can pull up -- actually, let's do
8 this in the interest of efficiency.

9 I'd like to mark the next few exhibits, and what we've
10 done is combine them together, and let's start with DTX-470
11 through 492. Although I will say that DTX-479 and 483 are
12 already in evidence. We offer those into evidence.

13 MS. NELSON: No objection.

14 THE COURT: Received.

15 (Defendant's Exhibits 470 through 492 received in
16 evidence)

17 Q. Mr. Langellier, there are two binders in front of you, if
18 you can pull the first binder and go to tab 14. Publish it to
19 the jury, please.

20 A. It's the same that's on the screen. Can I use the screen?

21 Q. Yes, you can use the screen if that would be easier for
22 you. Do you recognize this document?

23 A. So this would be a line sheet from the fall/winter '16
24 men's collection.

25 Q. Can you describe what this line sheet is?

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1 A. So this line sheet is used for -- during wholesale market
2 to give description of the product that is being sold, both to
3 retail and wholesale.

4 Q. And what is the description on the top of the document?

5 A. So knit jersey, fall/winter '16 men's collection.

6 Q. And if we turn to 471. Do you see that on the screen?

7 A. Yep.

8 Q. What is this document?

9 A. So this is another page of the same line sheet breaking
10 down what was available in that season, which this would be a
11 cashmere pullover crewneck sweater with a navy with 4-Bar on
12 the left-hand sleeve.

13 Q. Rather than go into every single one of these
14 Mr. Langellier, would you have line sheets for different items
15 for each year?

16 A. Correct. Each season for each collection it has, to some
17 extent, a book of line sheets.

18 MS. SAYOUR: Your Honor, I'd like to move into
19 evidence DTX-493 through 510, 511 through 526, 595 through 616,
20 617 through 633, 735 through 746.

21 MS. NELSON: No objection.

22 THE COURT: Received.

23 (Defendant's Exhibits 493 through 510, 511 through
24 526, 595 through 616, 617 through 633, 735 through 746 received
25 in evidence)

N1AQadi3

1 Q. Mr. Langellier, if you can look at tab number 158, which is
2 in book 2, this would be DTX-493 through 510. What are these
3 documents?

4 A. So this would have been a line sheet from the fall/winter
5 '17 men's collection, and this would be specifically jackets.

6 Q. Can you just scroll through what's in front of you briefly.
7 It's separated out by a blue slip sheet. Are these line sheets
8 for the whole collection in fall/winter 2010?

9 MS. NELSON: Objection.

10 A. Yes, both men and women's.

11 MS. NELSON: Mischaracterizes the document.

12 THE COURT: I think that's for cross-examination.

13 That's not an objection. Overruled.

14 A. I'm sorry can you re-ask the question?

15 MS. SAYOUR: Can you repeat the question please, court
16 reporter?

17 THE COURT: I'll read it. "Are these line sheets for
18 the whole collection in fall/winter 2010?

19 "Objection."

20 Then there was an answer, "Yes, both men's and
21 women's."

22 And then there was an elucidation of the ground for
23 the objection: "Mischaracterizes the document."

24 The Judge overruled that.

25 So I don't think there is any other question.

N1AQadi3

1 MS. SAYOUR: Maybe there wasn't. Maybe I got lost in
2 the objection. Thank you, your Honor.

3 BY MS. SAYOUR:

4 Q. If we can turn to tab 16 in your binder. Can you briefly
5 scroll through and describe what this document is?

6 A. This would be a line sheet -- sheets for the collection of
7 fall/winter '18 men's collection.

8 Q. Is the women's collection in those documents?

9 A. Yes, the women's is closer to the end of the selection.

10 Q. For the record, this is DTX-511 through 526.

11 Is that right, Mr. Langellier?

12 A. That is correct.

13 Q. If we look at tab 17, which is 595 through 615.

14 A. Yes, this would be the line sheets for SS-19 men's
15 collection.

16 Q. I believe I misspoke it's 595 through 616. Can you
17 describe these?

18 A. Yes, this is the line sheets for SS-19 men's collection.

19 Q. Is the women's collection also included?

20 A. It is towards the end.

21 Q. If we can turn to tab 18.

22 This would be DTX-617 through 633. Can you describe
23 these documents?

24 A. These would have been line sheets for spring/summer '20
25 men's and women's collection.

N1AQadi3

1 Q. And, finally, if we can go to the last tab, tab 19, DTX-735
2 through 746. Can you describe these documents?

3 A. This would have been the line sheets for SS-15 early
4 collection and runway collection.

5 Q. Thank you. We talked a little about retail. I'd like to
6 turn now and talk a little about wholesale. Can you describe
7 what you mean by wholesale?

8 MS. NELSON: Objection. Foundation.

9 THE COURT: Overruled.

10 A. So three ways of Thom Browne doing business is through our
11 retail brick-and-mortar stores. The second way is through our
12 ecommerce platform. And the third is through wholesale.
13 Wholesale is the department stores and specialty stores that we
14 sell Thom Browne products in.

15 Q. And in the years 2010 through 2012, did you have occasion
16 to assist with sale of the products at wholesale?

17 A. Yes, all of them.

18 Q. How so?

19 A. As we were a small team, at the time I bought for our
20 retail stores, and I also would assist wholesale clients during
21 those times and market after the fashion runway show.

22 Q. Which department stores was Thom Browne selling to at
23 wholesale when you started with the company?

24 A. So during 2010, Barneys New York, Bergdorf Goodman, Neiman
25 Marcus would have been some of the main U.S. retailers.

N1AQadi3

1 Q. I'd like to show you an exhibit that's marked as DTX-97.

2 Are you familiar with this document?

3 A. Yes, I am.

4 Q. What is it?

5 A. So this is a line sheet that we would use during wholesale
6 market, and we would give this to the people making the buys
7 for the stores where they could outline their purchase.

8 MS. SAYOUR: Your Honor, I'd like to offer DTX-97 into
9 evidence.

10 MS. NELSON: No objection.

11 THE COURT: Received.

12 (Defendant's Exhibit 97 received in evidence)

13 Q. If we can go to page 24. And before we do that, do you
14 know what season this is from?

15 A. I do not know what specific season this is from.

16 Q. If we can go to page 24. And if we can blow up the bottom
17 two images, please. Do you recognize those garments?

18 A. So this would have been cotton loopback sweatshirts.

19 Q. Do they feature the 4-Bar signature?

20 A. They do.

21 Q. If we go to page 27.

22 A. These are cotton loopback sweats with the 4-Bar on the
23 left-hand side, supplier code, which we call style number
24 MJQ001-W 4769.

25 Q. What is the supplier code, Mr. Langellier?

N1AQadi3

1 A. Supplier code is a style number that we would use to input
2 into our ERP system.

3 Q. I would like to show you another exhibit not in evidence
4 yet, DTX-98. Are you familiar with this document?

5 A. This is a line sheet. Yes. Spring/summer 2011.

6 MS. SAYOUR: Your Honor, we'd like to offer this
7 document into evidence.

8 MS. NELSON: No objection.

9 THE COURT: Received.

10 (Defendant's Exhibit 98 received in evidence)

11 Q. If we can pull up DTX-99.

12 Mr. Langellier, are you familiar with this document?

13 A. Yes, line sheet.

14 Q. What is the year or the season for this document?

15 A. I believe it is fall/winter 2011, but it is not written on
16 this document, so ...

17 MS. SAYOUR: Your Honor, we'd like to offer this
18 document into evidence.

19 MS. NELSON: No objection.

20 THE COURT: Received.

21 (Defendant's Exhibit 99 received in evidence)

22 Q. I'd like to show you an exhibit marked DTX-188. Are you
23 familiar with this document?

24 A. So, yes, this is an invoice.

25 Q. An invoice to who?

N1AQadi3

1 A. This is an invoice to Barneys New York.

2 Q. What is the date?

3 A. January 7 2011.

4 MS. SAYOUR: Your Honor, I'd like to move this exhibit
5 into evidence.

6 MS. NELSON: Objection. I think it would be helpful
7 to discuss as a sidebar issue.

8 THE COURT: All right.

9 (Continued on next page)

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N1AQadi3

(At the sidebar)

MS. NELSON: We discussed this previously. This witness is only in the retail capacity and has never had a role in wholesale. He testified that at no date assisted after shows. He's now being asked to speak to very detailed, very long invoices of which he had no knowledge. The bottom of the invoice, the name on the spreadsheet is not his. He wasn't the witness named on 30(b)(6) or the witness in charge of wholesale.

MS. SAYOUR: Your Honor, the witness testified this morning that he was involved in some of the wholesale purchasing and selling, is actually what I should say. And he -- I'm not going to show him the whole document. I'm about to match up some of the style numbers which I laid the predicate for in the previous document with the invoice to show exactly what it was.

THE COURT: I'm going to receive the document, but I think the jury is really losing focus so far. Most of this has consisted of just offering these documents and with until now no objection, and the question the jury is asking themselves is one of two questions: Either, so what? Or, oh, is it time for our nap? So I strongly suggest you get to the point.

MS. SAYOUR: Which I will do, your Honor. Thank you.

(Continued on next page)

N1AQadi3

1 (In open court)

2 THE COURT: Okay.

3 MS. SAYOUR: I'd like to offer DTX-188 into evidence,
4 your Honor.

5 THE COURT: Received.

6 (Defendant's Exhibit 188 received in evidence)

7 Q. If we can publish it to the jury, please, and go to page
8 100.

9 Mr. Langellier based on this document, does Thom
10 Browne sell sweatpants to Barneys with the 4-Bar signature in
11 2011?

12 A. Yes.

13 Q. If we can pull up DTX-97 and go to page 27. Are these the
14 sweatpants that were sold to Barneys in 2011?

15 A. That is correct. It is the same style number and
16 description.

17 Q. Thank you. I believe that you testified earlier that some
18 of the department stores that Thom Browne sold to in 2011 was
19 also Bergdorfs?

20 A. That is correct.

21 Q. Your Honor, I'd like to show you -- Mr. Langellier, I'd
22 like to show you what's been marked as DTX-189. Are you
23 familiar with this set of documents?

24 A. Yes, this is an invoice to Bergdorf Goodman dated
25 January 14, 2011.

N1AQadi3

1 MS. SAYOUR: Your Honor, I'd like to offer DTX-189
2 into evidence.

3 MS. NELSON: Same objection.

4 THE COURT: Same ruling. Received.

5 (Defendant's Exhibit 189 received in evidence)

6 Q. Can you describe what's in this document for the jury,
7 please?

8 A. So this would have been products that Bergdorf Goodman had
9 bought. Here you can see in the description. It says
10 sweatpants heather gray with four stripes on left leg.

11 Q. I'd like to also now show you what's been marked as
12 DTX-190. Are you familiar with this document?

13 A. This would have been an invoice for Nordstrom dated
14 January 5, 2011.

15 MS. SAYOUR: Your Honor, I'd like to offer DTX-190
16 into evidence.

17 MS. NELSON: Same objection.

18 THE COURT: Received.

19 (Defendant's Exhibit 190 received in evidence)

20 Q. You can take that down.

21 Mr. Langellier, you talked about retail stores. I
22 think we talked about department stores. I'd like to shift
23 gears for a minute and talk about online.

24 Does Thom Browne have a website?

25 A. We do, ThomBrowne.com.

N1AQadi3

1 Q. Was that website available one you started in 2010?

2 A. Yes, it was.

3 Q. I'd like to show you what's been marked as Exhibit DTX-333.

4 Are you familiar with this document?

5 A. So this is an archived image of the website showing the
6 2010 fall/winter collection.

7 MS. SAYOUR: Your Honor, I'd like to offer DTX-333
8 into evidence.

9 MS. NELSON: No objection.

10 THE COURT: Received.

11 (Defendant's Exhibit 333 received in evidence)

12 Q. Can you walk us through what's on this page, Mr.
13 Langellier?

14 A. So this landing page is a lookbook of the fall/winter 2010
15 collection.

16 Q. And you see an archive tab over to the left?

17 A. Yes, I do.

18 Q. Can you describe that tab?

19 A. So that would have been there to show all of the past
20 collections that Thom had designed.

21 Q. And this was in 2010, right?

22 A. Correct.

23 Q. Does the website today have an archive tab?

24 A. Yes, it still has an archive today which shows collections
25 all the way back to 2007.

N1AQadi3

1 Q. Now, did the website have a shopping feature in 2010?

2 A. It did not.

3 Q. Was a shopping feature added at some point?

4 A. In 2011 we added the function of a shopping page on
5 ThomBrowne.com.

6 Q. I'd like to show you what's been marked as DTX-334. Are
7 you familiar with this document?

8 A. Yes. So this would be an archived image of what the
9 website was like in 20 -- sorry -- in 2011 when we launched the
10 shopping feature.

11 MS. SAYOUR: Your Honor, I'd like to offer DTX-334
12 into evidence.

13 MS. NELSON: No objection.

14 THE COURT: Received.

15 (Defendant's Exhibit 334 received in evidence)

16 Q. Can you describe what's shown on this page?

17 A. This would have been the landing page to the shopping page
18 on ThomBrowne.com, and it was broken down into categories. The
19 first one would have been shirts, the next one tie and
20 accessories, leather goods, knits and then black tie and
21 tailoring.

22 Q. And if we can, you said that's knits, right? That's a
23 category. Is that the second to last one?

24 A. Correct.

25 Q. If we can turn to DTX-335. Can you describe this document?

N1AQadi3

1 A. So when you would click onto knits, this would go to the
2 next page which would have been where you can purchase --
3 select and purchase -- this is a cashmere cardigan -- in three
4 different colors with the 4-Bars on the left-hand sleeve.

5 MS. SAYOUR: Your Honor, can we move DTX-335 into
6 evidence, please.

7 MS. NELSON: No objection.

8 THE COURT: Received.

9 (Defendant's Exhibit 335 received in evidence)

10 Q. Can you describe for the jury this page?

11 A. Yes. So these are cashmere cardigans in three different
12 colors bearing the 4-Bar detail on the left-hand sleeve.

13 Q. There are also Grosgrain ribbon detail?

14 A. Yes, both in the placket and in the cuff.

15 Q. Mr. Langellier, has online shopping been available on the
16 website since 2011 until today?

17 A. Yes, it has.

18 Q. Have products bearing the 4-Bar signature been available
19 for sale on the Thom Browne website since 2011?

20 A. Yes, when we launched the website in 2011, this was
21 available.

22 Q. What about products bearing the Grosgrain signature, would
23 those have been available since 2011?

24 A. That is correct.

25 Q. I just want to ask you a couple questions about adidas.

N1AQadi3

Langellier - Cross

1 Has anyone ever told you that your 4-Bar signature
2 products look just like adidas?

3 MS. NELSON: Objection. Hearsay.

4 THE COURT: No. I don't think it's being offered for
5 its truth. I think it's being offered for whether or not such
6 a claim was ever made to them.

7 Overruled. You may answer.

8 A. No, nobody has ever said to me that it's confused Thom
9 Browne 4-Bar stripes with adidas.

10 Q. Has anyone ever told you that your Grosgrain signature
11 products look like adidas's trademark?

12 A. No.

13 Q. Has anyone ever told you that your 4-Bar signature product
14 looked like adidas's product?

15 A. No.

16 Q. And has anyone ever told you that your Grosgrain signature
17 products look like adidas's product?

18 A. No.

19 MS. SAYOUR: I pass the witness, your Honor.

20 THE COURT: Cross-examine.

21 CROSS-EXAMINATION

22 BY MS. NELSON:

23 Q. Mr. Langellier, you started as sales associate in Thom
24 Browne's New York store in 2010, right?

25 A. That is correct.

N1AQadi3

Langellier - Cross

1 Q. And between 2010 and 2012, you were a manager of Thom
2 Browne's New York retail store, right?

3 A. That is correct.

4 Q. You had no managerial role at that time relating to
5 wholesale sales, right?

6 A. That is correct.

7 Q. And from 2012 to 2016, you were retail director at Thom
8 Browne?

9 A. That is correct.

10 Q. Your job responsibilities did not involve department
11 stores?

12 A. We -- as a small company, everybody wore multiple hats, so,
13 yes, I was involved with department stores in the wholesale.

14 Q. As retail director between 2012 and 2016, you had no
15 managerial role over wholesale sales, right?

16 A. No managerial role, correct.

17 Q. I'd like to pull back up Defendant's Exhibit 190.
18 Mr. Langellier, you testified this being an invoice Nordstrom,
19 correct?

20 A. It is Nord -- yes.

21 Q. Are you aware that there's certain pages of this invoice
22 that are highlighted?

23 A. I did see highlights, yes.

24 Q. But you don't know who did the highlighting?

25 A. I do not.

N1AQadi3

Langellier - Cross

1 Q. You didn't do the highlighting?

2 A. I did not do the highlighting.

3 Q. If we could scroll until we hit the first highlighted page,
4 please. If you could back up a couple pages. Page 15. You
5 would agree with me that the first highlight appears on page 15
6 of this document?

7 A. Sure.

8 Q. If we could zoom out just a little bit so the whole page is
9 visible.

10 The highlighted item reads: PO hoodie, a lot of
11 abbreviations, 4-Bar stripes in gray, correct?

12 A. That is what it reads.

13 Q. On the face of the document, you can't see what this
14 product looked like, right? I'm sorry. On the face of this
15 document, you can't see what this product looked like, correct?

16 A. There is no picture of a product, no.

17 Q. And the highlighted product has the number three next to
18 it, right?

19 A. Yes, it does, of seven.

20 Q. Indicating of the highlighted item, the highlighted item
21 was three units, right?

22 A. Three units.

23 Q. Meaning three units were purchased?

24 A. Three units of seven, yes.

25 Q. I'd like to scroll to the next page. Once again, you see a

N1AQadi3

Langellier - Cross

- 1 highlighted row, right?
- 2 A. I see.
- 3 Q. Without an image?
- 4 A. That is correct.
- 5 Q. And, again, three units is highlighted?
- 6 A. Three units is highlighted.
- 7 Q. Let's go to the next highlighted page. We are now on page
- 8 23, right?
- 9 A. 23 at the top I see, yes.
- 10 Q. And the highlighted row doesn't say 4-Bar, right?
- 11 A. Because it is not 4-Bar.
- 12 Q. And there's four units highlighted?
- 13 A. Yes.
- 14 Q. And let's go to the next highlighted page. We are now on
- 15 page 24, right?
- 16 A. Yes.
- 17 Q. Once again, you see three units?
- 18 A. I see three units.
- 19 Q. And let's go to the next highlighted page. We are now on
- 20 page 36, right?
- 21 A. Yes, I see that at the top.
- 22 Q. Four units are highlighted?
- 23 A. Yes, four units.
- 24 Q. Indicating four units of this item were sold?
- 25 A. Yes.

N1AQadi3

Langellier - Cross

1 Q. And go to the final highlighted page. The highlighted item
2 is listed as a crewneck sweatshirt and appears to be light blue
3 cotton terry. Is that right?

4 A. That is correct.

5 Q. No mention of stripes?

6 A. No mention of stripes.

7 Q. No mention of a 4-Bar?

8 A. No mention of the 4-Bar.

9 Q. But the line's highlighted?

10 A. Yes, it is.

11 Q. And it shows five units, right?

12 A. Yes.

13 Q. If we were to do that math, it looks like there's 22 units
14 included in all of these invoices. Does that sound right to
15 you?

16 A. I guess.

17 Q. So out of 39 pages, there are six highlighted pages?

18 A. I'm sorry, I didn't bring a calculator.

19 Q. Let's pull up Exhibit 189. Once again, you see that
20 there's highlighting on this page?

21 A. Yep.

22 Q. Do you know how many pages in this exhibit are highlighted?

23 A. I do not.

24 Q. Do you know the total number of units that these invoices
25 show were sold to Bergdorf Goodman?

N1AQadi3

Langellier - Cross

1 A. I do not.

2 Q. Would you agree with me that it's less than 60?

3 A. I don't know, honestly.

4 Q. Do you have any reason to doubt that these invoices reflect
5 only 60 units of sales?

6 A. If we go through them, we can determine that.

7 Q. Let's start with the first page. You see 12 units, right?

8 A. Yes.

9 Q. Scroll until the next page is highlighted. So we had to
10 scroll all the way to page 21 to find another highlighted page,
11 correct?

12 A. Yes.

13 Q. And this page reflects 25 units?

14 A. Yep.

15 Q. Let's go to the next highlighted page, page 35. 13 units,
16 do you agree?

17 A. Yes.

18 Q. Let's go to the next highlighted page, page 67. We had to
19 skip all the way to page 67 to see the next highlighted, and I
20 see eight units. Is that right?

21 A. That is correct.

22 Q. When I add those up, I get 58?

23 A. Okay.

24 Q. You'd agree with me that within this invoice, there are
25 only certain pages that are highlighted?

N1AQadi3

Langellier - Cross

1 A. That is correct.

2 Q. Let's pull up Exhibit 188. That's a big one so we won't go
3 through it in full. Would you agree with me that there are,
4 again, only certain pages highlighted?

5 A. On this page there's nothing highlighted.

6 Q. If we could scroll just until we find the first highlighted
7 page. Keep scrolling. I believe it is page 96. We see three
8 highlighted items on this page?

9 A. That is correct.

10 Q. That is the first time highlighting appears in this
11 document?

12 A. This didn't go through 96 pages, the last one you clicked
13 on was 30 though.

14 Q. Can we please scroll from page 30 through 96?

15 Do you agree with me that the first highlighted page
16 appears on page 96?

17 A. Yep.

18 Q. And it reflects 18 units?

19 A. Yes.

20 Q. And you don't know the total number of highlighted items
21 that appear in this spreadsheet?

22 A. I do not know.

23 Q. You don't even know what the highlighting means as it
24 relates to this page, do you?

25 A. I assume that these -- I'm assuming that these are 4-Bar

N1AQadi3

Langellier - Cross

1 sweats.

2 Q. But there's no images on the page, right?

3 A. That is correct, just descriptions.

4 Q. And you didn't do the highlighting, right?

5 A. I did not do the highlighting.

6 Q. We can take that one down.

7 I want to the shift gears a little to Thom Browne
8 product focus. When you decided to work for Thom Browne New
9 York store, you knew Thom Browne was a menswear company, right?

10 A. Yes.

11 Q. And Thom Browne's focus has always been tailored?

12 A. Thom Browne is a clothing designer.

13 Q. The focus of the Thom Browne brand has always been
14 tailored?

15 A. Yes, we are also -- we also do tailoring.

16 Q. One of Thom Browne's brand symbols is the gray tailored
17 suit, right?

18 A. It is one of them.

19 (Continued on next page)

N1AsADI4

Langellier - Cross

1 BY MS. NELSON:

2 Q. That's been described as the DNA of the Thom Browne brand?

3 A. Yeah.

4 Q. Thom Browne's retail stores which you oversee are based
5 around tailoring, suiting, and overcoats, right?

6 A. We carry a full collection of the offering that Thom
7 designs.

8 Q. But the stores are based around tailoring, suiting, and
9 overcoats, right?

10 A. We carry the full collection of Thom Browne in our retail
11 stores.

12 MS. NELSON: I would like to pull up Mr. Langellier's
13 prior transcript just for the witness and the court, please.

14 I would direct you to pages 99 to 100, starting at
15 line 11 of page 99.

16 Again, starting at line 11 of page 99 going through
17 line 10 of page 100, your Honor, I would like to offer that for
18 impeachment purposes. The question was that Thom Browne's
19 stores are based around tailoring, suiting, and overcoats.

20 MS. SAYOUR: Objection, your Honor.

21 THE COURT: The objection is sustained.

22 BY MS. NELSON:

23 Q. Thom Browne only has one store in the United States, only
24 had one store in the United States when you started in January
25 of 2010, right?

1 A. That is correct.

2 Q. And Thom Browne still only has one store in New York City?

3 A. Yes.

4 Q. Thom Browne's store in New York City is a destination
5 location because it stands alone in TriBeCa, right?

6 A. Yes, that is correct.

7 Q. It's not a highly foot-trafficked store?

8 A. It is not. It receives between 10 and 17 footsteps a day.

9 Q. And it's been about 10 to 15, 17 footsteps a day since you
10 started in 2010, right?

11 A. That is correct.

12 Q. And by footsteps, we mean attached to people, people in the
13 store, right?

14 A. That is correct.

15 Q. Thom Browne now has a store in Miami, right?

16 A. That is correct.

17 Q. And two in California?

18 A. Two in California.

19 Q. But the Miami store didn't open until 2018, right?

20 A. Yes, that is correct.

21 Q. And the California stores came after that?

22 A. That is correct.

23 MS. NELSON: I would like to pull up Exhibit 649, and
24 just for the court and the witness at the moment.

25 Plaintiff's Exhibit 649.

NlAsADI4

Langellier - Cross

1 Q. Do you recognize this as a screen capture from Thom
2 Browne's website listing its store locations?

3 A. That is -- yes, that is our website.

4 MS. NELSON: I would like to offer this exhibit.

5 MS. SAYOUR: No objection, your Honor.

6 THE COURT: Received.

7 (Plaintiff's Exhibit 649 received in evidence)

8 BY MS. NELSON:

9 Q. So in the upper left-hand corner of this page -- if we can
10 zoom in -- that is a photo of Thom Browne's New York store,
11 right?

12 A. Yes.

13 MS. NELSON: If we can zoom in on the upper left-hand
14 corner for everyone.

15 Q. OK. I'll ask the question again now that we're zoomed in.

16 This is a screenshot showing an image of the TriBeCa
17 store, is that right?

18 A. That is correct.

19 Q. There are no four-stripe products visible in this photo,
20 right?

21 A. Not that I see.

22 Q. And Thom Browne's stores reflect a minimalist presentation,
23 right?

24 A. Yes.

25 Q. It's been that way since you started in 2010?

N1AsADI4

Langellier - Cross

1 A. Yes.

2 Q. Typically on a 30-inch shelf, such as those that we see
3 here, there would only be one product per shelf?

4 A. Typically, yes.

5 Q. And on this shelf we don't see any four-bar products,
6 right?

7 A. Not in the blurry photo, no.

8 MS. NELSON: Let's pull up Exhibit 837, again, just
9 for the court and the witness at the moment.

10 Q. Do you recognize this as an e-mail that you sent to
11 Melissa Jamerson on March 30, 2021, with the subject, retail TB
12 introduction?

13 A. I do recognize it.

14 Q. There's an attachment called Thom Browne brand
15 introduction?

16 A. Yes.

17 Q. Are you familiar with that attachment?

18 A. No.

19 Q. But you recognize this as an e-mail that you sent?

20 A. Yeah, it is.

21 MS. NELSON: I would like to offer this exhibit into
22 evidence.

23 MS. SAYOUR: We have no objection.

24 THE COURT: Received.

25 (Plaintiff's Exhibit 837 received in evidence)

N1AsADI4

Langellier - Cross

1 BY MS. NELSON:

2 Q. If we could scroll to page 11, which is part of the
3 attachment to this presentation.

4 Do you recognize these as photos of the Thom Browne
5 New York store?

6 A. Very old photos, yes.

7 Q. And there is no apparel with four-bar visible in these
8 photos?

9 A. There are three stripes on the coffee table, yes. There is
10 also a three stripes on the wall.

11 Q. I couldn't hear you.

12 A. Yes. There is three stripes on the coffee table.

13 Q. But not on the products themselves?

14 A. That is product.

15 Q. Let's shift gears. We can take that down and shift gears a
16 little bit to your e-commerce experience.

17 Between 2012 and 2016, your experience included
18 e-commerce, is that right?

19 A. That is correct.

20 Q. Prior to 2012, a consumer could not actually purchase a
21 product on Thom Browne's website, right?

22 A. No. In 2011, we launched the website with the shopping
23 feature.

24 MS. NELSON: I would like to pull up Mr. Langellier's
25 testimony. Again, just publishing to him and the court,

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Langellier - Cross

1 please. I direct you to page 28, specifically 28:21 to 29:9.

2 Further down, please. Focus being 29:4 to 9. I would
3 like to offer this for impeachment.

4 MS. SAYOUR: Objection, your Honor.

5 MS. NELSON: The question being --

6 THE COURT: Yes, I understand.

7 The objection is sustained.

8 BY MS. NELSON:

9 Q. I would like to pull up Exhibit 894. If you can scroll
10 down the page so the witness can see it.

11 Do you recognize this as a screenshot of Thom Browne's
12 website from 2010?

13 A. Yes.

14 MS. NELSON: I would like to offer this into evidence.

15 MS. SAYOUR: No objection.

16 THE COURT: Received.

17 (Plaintiff's Exhibit 894 received in evidence)

18 Q. So on the face of this website, there are no e-commerce
19 capabilities as of 2010, right?

20 A. In 2010, there was not.

21 Q. And no products displayed on the home page?

22 A. I don't see any products on the home page, no.

23 Q. Prior to 2012, a consumer could purchase Thom Browne
24 products at the Thom Browne store in TriBeCa, right?

25 A. Yes.

N1AsADI4

Langellier - Cross

1 Q. They could purchase them at Barney's New York?

2 A. Yes.

3 Q. And they could purchase them at Bergdorf in New York?

4 A. Yes.

5 Q. And that is it, correct, Thom Browne New York, Barney's
6 New York, and Bergdorf Goodman would be the only places prior
7 to 2012 a consumer could purchase Thom Browne products?

8 A. No, that is not correct. We in the city offered Thom
9 Browne product at Jeffrey's New York, which was in the
10 Meatpacking.

11 MS. NELSON: I would like to again bring up the
12 witness's testimony, this time pages 29 to 30.

13 THE COURT: Lines?

14 MS. NELSON: 28:21 to 29:9. I'm sorry. My apologies,
15 your Honor. 29:20 to 30:9.

16 MS. SAYOUR: Objection, your Honor.

17 THE COURT: Any objection?

18 MS. SAYOUR: Objection. Yes, your Honor.

19 THE COURT: Well, it's a close call, but I will allow
20 it. You may read that.

21 MS. NELSON: I would like to publish this to the jury
22 lines 29:20 to 30:9.

23 BY MS. NELSON:

24 Q. The question: Prior to 2012, where could a consumer
25 purchase Thom Browne's products in the U.S.?

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Langellier - Cross

1 Answer: Our TriBeCa store, Bergdorf Goodman, Barney's
2 New York. That would be the major accounts, I would say, from
3 my knowledge.

4 Did I read that correctly?

5 A. From my knowledge, yes.

6 Q. I want to shift gears again.

7 Thom Browne's customer base has steadily grown since
8 you started, right?

9 A. Yes.

10 Q. It now includes a very wide range of customers from
11 students to seniors?

12 A. Yeah.

13 Q. Men and women?

14 A. Men and women, kids.

15 Q. And you're familiar with the visual appearance of Thom
16 Browne's stores, right, in store, retail stores?

17 A. Yeah.

18 Q. There are not marketing materials such as posters or
19 pictures on the walls of any Thom Browne retail stores,
20 right --

21 A. No.

22 Q. -- in the United States?

23 Thom Browne barely even has a sign out in front of its
24 New York store, right?

25 A. We have a small sign in front of our store, yes.

N1AsADI4

Langellier - Cross

1 Q. The lack of posters and pictures on the walls and the small
2 sign has always been the case?

3 A. Yes.

4 Q. You don't know of a time when the four bars were displayed
5 in Thom Browne's retail stores other than on the products
6 themselves?

7 A. I'm sorry. Can you repeat the question?

8 Q. Sure. You aren't aware of any instance where the four bars
9 were displayed anywhere in the store other than on the products
10 themselves?

11 A. That's fair, yes.

12 Q. And the same is true of the Grosgrain design?

13 A. On the product, yes.

14 Q. And you're not aware of any marketing or advertising Thom
15 Browne has done prominently featuring the four bars outside of
16 the products?

17 A. Yeah, our fashion shows.

18 Q. Outside of fashion shows, you're not aware of any other
19 forms of advertising?

20 A. Not outside of fashion shows.

21 Q. You're not aware --

22 A. I'm sorry. For retail, Barney's New York and Bergdorf's at
23 times would put it in their magazines as well.

24 Q. You're not aware of any Thom Browne packaging that features
25 the four-bar design, right?

N1AsADI4

Langellier - Redirect

1 A. Not the four-bar design, no.

2 Q. You have no knowledge of how many consumers recognize the
3 four bars as a Thom Browne design?

4 A. No, I don't.

5 MS. NELSON: I have no further questions.

6 THE COURT: Any redirect?

7 MS. SAYOUR: Very brief.

8 THE COURT: Go ahead.

9 REDIRECT EXAMINATION

10 BY MS. SAYOUR:

11 Q. Mr. Langellier, during the examination a few moments ago
12 you were shown some prior testimony of yours?

13 A. Yes.

14 MS. SAYOUR: Can we pull that prior testimony back up.
15 It was on page 29, line 20, through page 30, line 4.

16 Q. When you were asked: Prior to 2012, where could a consumer
17 purchase Thom Browne products in the United States; you
18 answered: One TriBeCa store, Bergdorf Goodman, Barney's New
19 York. Those were work the major accounts, I would say, from my
20 knowledge.

21 Do you see that?

22 A. Yes.

23 Q. What did you mean by major accounts?

24 A. They are larger stores that would have carried Thom Browne.

25 Q. But there would have been other stores that carried Thom

N1AsADI4

Langellier - Redirect

1 Browne at that time?

2 A. There could have been, yes. One of them which is Jeffrey's
3 New York, which is a smaller store, specialty store in the
4 Meatpacking District in New York City.

5 Q. Were there other stores that you can recall?

6 A. No.

7 MS. SAYOUR: I have no further questions, your Honor.
8 Thank you.

9 THE COURT: All right. Anything else?

10 MS. NELSON: No, your Honor.

11 THE COURT: Thank you very much. You may step down.

12 (Witness excused)

13 All right. I understand that there are two short
14 videos that need to being played at this point.

15 Go ahead.

16 MR. MALDONADO: Yes, your Honor, we have two videos.
17 One is 16 minutes and one is 24 minutes.

18 THE COURT: I see. I'm sorry. I didn't realize it
19 was that long.

20 All right. I'll tell you what we'll do. We'll take
21 an early lunch.

22 So, ladies and gentlemen, you're in luck. I know how
23 hungry you are at this time. So we will take an hour break for
24 lunch and resume at 10 minutes before two.

25 Have a good lunch.

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Langellier - Redirect

(Continued on next page)

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Langellier - Redirect

1 (Jury not present)

2 THE COURT: I think that rather than hear further from
3 plaintiff's counsel on the pending motions, we'll do that later
4 this afternoon.

5 The court takes notice of the illustrious counsel,
6 Rachel Fleishman, who is invited to come to my chambers and
7 join me for lunch.

8 We'll see you all in an hour.

9 MR. HENN: Do you want us at an hour, your Honor, or
10 at two?

11 THE COURT: No, in an hour.

12 I will hand out to counsel proposed jury instructions.
13 This is just the first draft, of course. We'll have a full
14 conference tomorrow.

15 Look them over tonight, and if you want to add
16 anything as opposed to objecting to something, you should bring
17 with you tomorrow your specific wording that you want. So I
18 don't want to have to deal with sort of a general, can we put
19 something in about X, Y or Z, or something very specific. It
20 can be what you suggested in your original submissions or
21 something new, but some specific wording

22 OK. I'll still see you at 10 minutes to two

23 (Luncheon recess)

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AFTERNOON SESSION

1:50 p.m.

(Jury present)

MR. MALDONADO: Defendants call Joanne Arbuckle.

THE COURT: We're all set too show the video?

MR. MALDONADO: Yes, your Honor.

THE COURT: Ladies and gentlemen, we are going to see some videotape testimony, and you evaluate that just the same as you would as if it was a live witness go ahead.

MR. MALDONADO: Your Honor, the defendants would play videotape first of Dana Kabelá.

(Videotape played)

MR. MALDONADO: Your Honor, we'd like to play the deposition testimony for Taylor Hallbrook.

THE COURT: Okay.

(Videotape played)

MR. MALDONADO: Your Honor, we would like to move into evidence the exhibits referenced in the videotape deposition. The parties have agreed to redacted version of Defendant's Exhibit 22 and, then also Plaintiff's Exhibits 140, 141 and 142.

MR. HENN: No objection.

THE COURT: Received.

(Defendant's Exhibit 22 received in evidence)

(Plaintiff's Exhibits 140, 141 and 142 received in

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evidence)

MR. MALDONADO: Your Honor, the defendant calls Joanne Arbuckle.

THE COURT: Before she comes in, come to the sidebar.

(Continued on next page)

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(At the sidebar)

THE COURT: So I have now had a chance to review Ms. Arbuckle's report again, as well as the briefing on the motion in limine regarding her testimony, and also to go back and compare it with some of the rulings I made including more recently on some of the other experts. It seems to me that her report and really the total thrust of most of what she says goes to the aesthetic functionality of the counterclaim that is no longer before the Court, and therefore to that extent is irrelevant.

I do think she can offer testimony but not opinions. Just to the appearance of the Three-Stripe Mark as an historical matter in numerous situations, I think that goes to the distinctiveness of the adidas mark and also the strength of the adidas mark which are issues in this case. But this would be more in the nature than simply saying as someone in this field I went back and looked at -- had access to and looked at numerous places where I found that the three stripes were used, or whatever, complete with visuals accompanying her report. So that is the limits of which she can testify to. So you may need to alert her to that just before she comes in.

MR. MALDONADO: Just to clarify. It's only three stripes, like no other numbers of stripes?

THE COURT: No, it can be other numbers.

MR. HENN: You said no opinion. In other words, she's

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not permitted to be able to say what the impact of that may be.

THE COURT: Yes.

MR. MALDONADO: Did I have a few minutes to confer
with her? Thank you.

THE COURT: Yes.

(Continued on next page)

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(In open court)

JOANNE ARBUCKLE,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

BY MR. MALDONADO:

THE COURT: Please be seated. State your full name and spell it for the record.

THE WITNESS: My name is JoAnne Arbuckle.
J-O-A-N-N-E. A-R-B-U-C-K-L-E.

BY MR. MALDONADO:

Q. Good afternoon, Ms. Arbuckle.

What is your current occupation?

A. Good afternoon. I am a consultant in the office of the president at the Fashion Institute of Technology.

Q. Thank you. Can you tell us what your educational background is?

A. Yes. I hold an associate's degree in fashion design from FIT, a bachelor's degree from Empire State, State University of New York, and my graduate degree is from NYU.

Q. Do you have an experience working in the fashion industry?

A. I do.

Q. Can you please tell us about that experience.

A. Yes, I was a designer for many years in the industry before I turned to teaching. In order to teach at FIT, you must be an accomplished executive in your respective design industry. And

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1 when I first began teaching at FIT, I continued to consult in
2 designing in the industry.

3 Q. Please tell us about your first job in the fashion
4 industry.

5 A. My first position was for a company by the name of Ban-Rol
6 which was a higher end intimate apparel company and I was at
7 Ban-Rol for approximately a year as an assistant designer.

8 Q. What types of clothing did you design at Ban-Rol?

9 A. So that was intimate apparel which is anything from what
10 you would consider daywear, so camisoles, teddies, to sleepwear
11 and loungewear.

12 Q. And what years did you work at Ban-Rol?

13 A. That was '74 to '75.

14 Q. And where did you work next?

15 A. I then moved on to a company by the name of L.V. Miles as
16 an associate designer, and that company was at the time the
17 second largest sleepwear company in the industry, and we did
18 children's, juniors and ladies sleepwear.

19 Q. And did you design apparel in that job?

20 A. I did. And I then became their design director.

21 Q. What types of apparel did you design at L.V. Miles?

22 A. So I did some children's wear but mainly junior and Missus
23 sleepwear, as well as that particular period of time in the
24 industry we were moving away from traditional sleepwear into
25 the more sort of sporty look sleepwear that you might recognize

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1 in a night shirt, casual, leisure wear. And so I really began
2 moving in that direction when I was at L.V. Miles.

3 Q. Can we please pull up Exhibit 372. Ms. Arbuckle, can you
4 look at the screen and tell me if you recognize these images?

5 A. I do.

6 Q. Just generally tell us in general what the images are?

7 A. So these are some examples of garments that I designed when
8 I was at L.V. Miles. We did everything from mass market to
9 department stores, so they might be something that would sell
10 at the time at a J. C. Penney as well as at Bloomingdales.

11 Q. Let me interrupt you for a second. Were these designs
12 actually made into products that were sold?

13 A. These are the designs that were in a catalog that was
14 completed for every season by an illustrator, and so they
15 wouldn't have gone into the catalog if they already weren't in
16 production.

17 Q. Thank you.

18 MR. MALDONADO: Your Honor, I offer Exhibit 372.

19 MR. FLEMMING: Objection. Relevance.

20 THE COURT: I think it meets the very broad definition
21 of relevance, so it will be received.

22 MR. MALDONADO: Thank you, your Honor.

23 Please publish it to the jury.

24 (Defendant's Exhibit 372 received in evidence)

25 Q. Ms. Arbuckle, can you please describe what's being shown

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1 here in these drawings?

2 A. So these are examples of nightshirts as well as a two-piece
3 sort of a take on a jogging suit that was created with this
4 sort of sporting look to it. I know that when I did these, I
5 was really looking to sports teams and the influence of sports
6 teams as part of my inspiration.

7 Q. Did you use stripes in your designs?

8 A. I did.

9 Q. Can you tell us where we see those in these designs?

10 A. Yes. In the first image, which was a sweatshirt material,
11 there's three stripes on each arm. In the second, two stripes
12 on one arm. And in the third, which is a sort of little mini
13 collection, you see the use of stripes in the neck, the arm
14 bands on the two piece. You see parallel stripes going down
15 one of the sleeves, and then you see parallel stripes that are
16 inserted into a sleeve seam on the neckline.

17 Q. Take that down.

18 Please tell the jury where you worked after L.V.
19 Miles.

20 A. After L.V. Miles I went to a company by the name of Beverly
21 Verdon where I continued in the position of head designer where
22 I did women's, children's sleepwear as well as children's
23 sportswear.

24 Q. After that job, where did you work next?

25 A. I moved to Candlesticks, which was children's sleepwear and

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1 swimwear. I did not do the swimwear, but that was the company.
2 And from there I moved to Royal Silk, which is a catalog
3 company naturally focused on silk, as is in the name. I was
4 initially hired to do all of their intimate apparel, and I then
5 moved into overseeing the entire catalog which was women's
6 sportswear.

7 Q. What types of sportswear did you design at Royal Silk?

8 A. So the coordinated sportswear that, you know, we would see
9 in a contemporary sportswear department, so jackets, pants,
10 skirts, sweaters, blouses.

11 Q. How long did you work at Royal Silk?

12 A. I was with Royal Silk until '94 when I began my own
13 company. They continued as a client for several years as part
14 of the consulting that I did in the industry.

15 Q. What was the company that you founded?

16 A. Design Integrity.

17 Q. What was the business of that company?

18 A. I did consulting in design.

19 Q. What types of apparel did you work on in that job?

20 A. Mainly children's wear and intimate apparel, I think with a
21 little bit of sportswear. Certainly sportswear at Royal Silk
22 when they were my client.

23 Q. And how long did you work for your own company until what
24 year?

25 A. I closed my company in 2004. At that point I was very

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1 engaged in the work of the college, and it just wasn't
2 something I could give the proper attention to.

3 Q. When did you join FIT?

4 A. So I began as an adjunct in 1986. I became a full-time
5 member of the faculty in 1994 and a full professor in 2006.

6 Q. What courses do you teach while at FIT?

7 A. I tenured in the fashion design department, so I taught all
8 of the apparel classes from the intro, the first semester
9 classes through eighth semester, or what we call capstone,
10 where the students create their own collections.

11 Q. Did you teach any classes having to do with the use of
12 stripes in clothing design?

13 A. I did. I taught a certificate program, a credit
14 certificate program that consisted of four courses, and the
15 last course, the capstone project or the end project focused on
16 stripes, and it really was an opportunity where you could teach
17 the students about grain and how stripes reacted with changing
18 grains as well as how you could use stripes to make
19 aesthetically pleasing garments.

20 Q. At some point did you become dean?

21 A. I did in 2005.

22 Q. How long were you in that position?

23 A. Until 2016.

24 Q. Is that when you assumed your current position?

25 A. No. I stepped down as dean in 2016 and became a deputy to

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1 the president for industry partnerships and collaborative
2 programs.

3 Q. I'd like to pull up Exhibit 404, please, and ask the
4 witness if you recognize this document?

5 A. I do.

6 Q. What is this document?

7 A. It's my CV.

8 Q. Does this fairly accurately describe your relevant
9 background and experience?

10 A. It does.

11 MR. MALDONADO: Your Honor, I'd like to offer Exhibit
12 404 into evidence.

13 MR. FLEMMING: No objection.

14 THE COURT: Received.

15 (Defendant's Exhibit 404 received in evidence)

16 Q. Ms. Arbuckle, when you were at FIT or since you've been at
17 FIT, have you been involved in any exhibitions at the college?

18 A. Yes, I was involved in specific exhibitions, but as a dean
19 it was my responsibility to oversee all the exhibitions in the
20 School of Art and Design. The School of Art and Design
21 consists of 17 programs, so there were a substantial number of
22 exhibitions that took place. Specifically, there was an
23 exhibition on school uniforms that was at the Museum at FIT as
24 well as a City Museum of the City of New York.

25 Q. When was that?

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1 A. That had to be before 2002. And I'm very proud of the fact
2 that because the School of Art and Design did not have
3 permanent exhibition space, together with my faculty we
4 garnered the support of the president and the college, and for
5 the first time in the history of the college we had a 4,000
6 square foot gallery open to the public with an entrance on
7 Seventh Avenue for the college. So quite a beautiful
8 exhibition space that exists today.

9 Q. Have you offered or contributed to any books in the fashion
10 field?

11 A. Yes. I'm the co-author of the *Historical Dictionary of*
12 *Fashion*, and that's a first and second edition. And I'm an
13 S.A. contributed to the *Encyclopedia of Fashion*.

14 Q. Tell us a little bit about the *Dictionary of Fashion*?

15 MR. FLEMMING: Objection. Relevance.

16 THE COURT: Sustained.

17 MR. MALDONADO: Your Honor, may I be heard on that?

18 THE COURT: No. What was the other book?

19 THE WITNESS: It was the *Encyclopedia of Fashion* by
20 Valerie Steele.

21 THE COURT: Tell us about that.

22 MR. MALDONADO: The dictionary is the only one I
23 really wanted to ask about.

24 THE COURT: I'm sorry?

25 MR. MALDONADO: I said the dictionary was the one I

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1 wanted to ask her about.

2 THE COURT: Come to sidebar.

3 (Continued on next page)

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(At the sidebar)

MR. MALDONADO: The dictionary is a dictionary she coauthored that's used in the industry, and it contains definitions for some terms that's being used in this litigation, such as sportswear.

THE COURT: We're not getting into that. We're getting into, as I indicated previously, she's just going to say: I was asked, among other things, to look at where stripes have been used in clothing in the past, and here is what I found.

MR. MALDONADO: Okay. Thank you.

(Continued on next page)

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(In open court)

BY MR. MALDONADO:

Q. Ms. Arbuckle, were you asked to review the history of the use of stripes in the fashion industry?

A. Yes, I was.

Q. And did you do so?

A. I did.

Q. Tell us what you did in that regard.

A. So I looked to many areas that would communicate how parallel stripes were used in the fashion industry, not only by myself, as you saw examples of. It's really about how you would do any sort of research, even research for your own line. So I went to numerous museum sites. I used the special collections area of the FIT library, which is a special collections of relevant primary source materials which consists of rare books and fashion plates and oral histories from designers. So something like that is a great resource as you're researching something like stripes. The Smithsonian is another place to go for stripes, and areas of the Naval Museum, as well as exhibitions that have taken place not only at FIT but elsewhere.

Q. You mentioned special collections at FIT. Who curates that collection?

A. That's Professor Karen Trivette, and she is the head of special collections. She oversees what's accepted into special

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1 collections and how all of it is cataloged, and it's a part of
2 the Gladys Marcus Library at FIT.

3 Q. Are the items in the special collection dated?

4 A. Yes, they are.

5 Q. Do you know whether those dates are verified?

6 A. They are verified by Karen. Before they're placed into
7 special collections, everything is verified.

8 Q. Can we please take a look at Defendant's Exhibit 264. Can
9 you please just identify this for us first?

10 A. Yes. So this is an image that is on the -- it's called the
11 Spark Digital website, which is special collections. I know it
12 also exists in the special collections itself, the original
13 plate. And so it's an image of --

14 Q. Don't describe the image yet.

15 A. Sorry.

16 Q. Is this an image that you captured?

17 A. It is.

18 Q. Does this accurately reflect the image that you captured?

19 A. It does.

20 MR. MALDONADO: Your Honor, I'd like to offer 264 into
21 evidence.

22 MR. FLEMMING: Objection. 402, 403 and hearsay.

23 THE COURT: Overruled. Received.

24 MR. MALDONADO: Thank you, your Honor.

25 (Defendant's Exhibit 264 received in evidence)

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1 Q. Can we please publish this?

2 Ms. Arbuckle, please explain to the jury what this
3 image shows.

4 A. So this is an image from the 1800s, 1865, and I'm really
5 looking to the image to the right that communicates the use of
6 stripes on the bodice, on the sleeve, on the sort of overcoat
7 and the hem. The stripes you can see are used in a couple of
8 ways. They're used as an embellishment, as a part of the
9 design, but in the bodice area, you're able to use the stripes
10 to cover what has to be a seam because that bodice could not
11 actually --

12 MR. FLEMMING: Objection. Opinion.

13 THE COURT: I think the question is just where are the
14 stripes, and you pointed that out.

15 Q. Thank you. Let's move on to the next exhibit, Exhibit 242.

16 Ms. Arbuckle, can you please just first tell us what
17 this document is?

18 A. Yes. It's an image from the Naval History and Heritage.

19 Q. Is this an image that you collected?

20 A. It is.

21 Q. Is the image you collected accurately reflected here?

22 A. It is.

23 MR. MALDONADO: Your Honor, I move in 242, please.

24 MR. FLEMMING: Same objection.

25 THE COURT: Same ruling. Received.

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1 (Defendant's Exhibit 242 received in evidence)

2 Q. Ms. Arbuckle, please explain to the jury what's shown in
3 this image.

4 A. So it's U.S. Navy Officer's uniform, and that uniform
5 demonstrates the use of parallel stripes on the sleeve as well
6 as down the leg of the pant.

7 Q. Okay. Let's look at the next exhibit, Exhibit 210. And if
8 you can again first tell us what this is.

9 A. Yes, so this is from the Air and Space Museum, and it's a
10 pilot's uniform.

11 Q. Is this an image that you collected?

12 A. It is.

13 Q. And is this a fair and accurate representation of that
14 image?

15 A. It is.

16 MR. MALDONADO: Your Honor, I move in 210.

17 THE COURT: Same objection. Same ruling. Received.

18 MR. MALDONADO: Thank you.

19 (Defendant's Exhibit 210 received in evidence)

20 Q. Can you please describe for the jury what's shown in this
21 picture?

22 A. So this is a TWA pilot's uniform. Again, it communicates
23 the parallel stripes on the sleeve which speak to --

24 MR. FLEMMING: Objection. Opinion.

25 THE COURT: Yes, just limit yourself to pointing out

N1AQadi5

1 the stripes.

2 A. Got it.

3 Q. Just describe what you see on the screen.

4 A. Thank you.

5 Q. And not explain what the meaning is.

6 Thank you, Ms. Arbuckle. Let's move on then to -- let
7 me ask you, about exhibitions at FIT. Do you attend any
8 exhibitions at FIT?

9 A. I try to attend most of the exhibitions at -- certainly at
10 the Museum at FIT, and naturally when I was dean, I attended
11 all of the exhibitions that related to my school, but we have
12 renowned exhibitions at the museum, and more often than not I
13 will attend the opening of those exhibitions.

14 Q. Are you familiar with the uniformity exhibition?

15 A. I am.

16 Q. Can you tell us about that?

17 A. So the uniformity exhibition was a focus on the positioning
18 of uniforms and how they relate to what designers were doing in
19 the industry, how they -- how these uniforms serve as a source
20 of inspiration.

21 Q. When was this exhibition held?

22 A. 2016.

23 Q. And did you attend this exhibition?

24 A. I did.

25 Q. Let's pull up Exhibit 239, please. I'd like you to just

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1 identify first what this is?

2 A. So this is a capture from the uniformity exhibition that
3 was on the FIT website, museum website.

4 (Continued on next page)

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Arbuckle - Direct

1 BY MR. MALDONADO:

2 Q. Did you capture these images?

3 A. Yes.

4 Q. And do they accurately reflect what you captured?

5 A. They do.

6 MR. MALDONADO: Your Honor, I would like to move into
7 evidence 239.

8 THE COURT: Same objection, same ruling, received.

9 (Defendant's Exhibit 239 received in evidence)

10 MR. MALDONADO: Thank you.

11 Q. Ms. Arbuckle, can you describe what is shown on this page,
12 the first page of this exhibit?

13 A. So at the top of the image you actually see a photo taken
14 from Thom Browne's show, his Pitti show that took place in
15 Italy. You see the models in uniformity on the runway.

16 Q. OK. If we turn to page nine, please.

17 Explain what we see here on page nine.

18 A. The center photo is another image from the uniformity
19 exhibition, and this is an Army dress uniform.

20 Q. OK. If we turn to page six, please.

21 Please explain to the jury what we see in this center
22 photo here.

23 A. This is another image from that exhibition, and this is
24 where you see a woman's dress from the 1800s that's trimmed in
25 stripes.

NlAsADI6

Arbuckle - Direct

1 Q. Thank you.

2 Let's take a look now at the next exhibit,
3 Exhibit 235.

4 Can you please describe what this is on this exhibit?

5 A. This is an image from Vogue runway of a Tommy Hilfiger
6 coat.

7 Q. Is this an image that you captured from the Internet?

8 A. Yes.

9 Q. Is this a fair and accurate representation of the image you
10 captured?

11 A. It is.

12 MR. MALDONADO: Your Honor, I would like to offer 235.

13 THE COURT: Same objection, same ruling, received.

14 (Defendant's Exhibit 235 received in evidence)

15 Q. Can you explain for the jury what is shown in this image,
16 please?

17 A. This is a coat that has parallel stripes on the sleeve and
18 is a double breasted pee coat.

19 Q. Is this a military uniform?

20 A. It's not a military uniform.

21 Q. Thank you.

22 Can we please now take a look at Exhibit 230, page 11.
23 Going back to the uniformity exhibit, page 11, please. This is
24 already in evidence.

25 Please describe for the jury what is shown in this

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Arbuckle - Direct

1 image.

2 A. So this is an image directly from the exhibition. And in
3 the exhibition, what you would see throughout the exhibition is
4 in the center is a traditional football uniform from, I
5 believe, somewhere around the 1900s. But what's interesting is
6 how the curated men shows on the left a sequent gown by
7 Geoffrey Beene and on the right is garment by Stella Jean.

8 And the goal here is to show --

9 MR. FLEMMING: Objection, opinion.

10 A. That's what I see.

11 THE COURT: Yes.

12 Q. Can you please describe the use of stripes here in these
13 images?

14 A. Yes. They were parallel stripes on the sleeves of the
15 Geoffrey Beene and the Stella Jean garment.

16 Q. Do you know the dates of the Geoffrey Beene and Stella Jean
17 apparel?

18 A. I don't remember them.

19 Q. OK. Are you familiar with FIDM?

20 A. I am.

21 Q. What does that refer to?

22 A. Fashion Institute of Design and Merchandising in LA.

23 Q. OK. Have you attended any exhibitions there?

24 A. I haven't attended their exhibitions, no.

25 Q. Have you aware of any exhibitions that have been held

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Arbuckle - Direct

1 there?

2 A. I am.

3 Q. Are you familiar with any exhibitions that were held there?

4 Tell us which exhibitions you're familiar with.

5 A. So the most recent --

6 THE COURT: Is this a rival school?

7 THE WITNESS: We like to think of ourselves as peers.

8 THE COURT: I thought there was no comparison between
9 FIT and all the rest, but all right.

10 THE WITNESS: I'm being gracious, your Honor.

11 THE COURT: All right. Go ahead, counsel.

12 THE WITNESS: So...

13 MR. MALDONADO: We always need to have a West Coast
14 counterpart.

15 A. So it was, yes, from their sporting women exhibition, which
16 ranged from the 1800s to 1960.

17 Q. OK. That's the sporting fashion exhibition?

18 A. Yes, it is.

19 Q. And did you research that as part of the research that you
20 did for this case?

21 A. I did.

22 Q. And did you review any materials associated with that
23 exhibition?

24 A. I did.

25 Q. What did you review?

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Arbuckle - Direct

1 A. I reviewed the images from the exhibition. There is also a
2 wonderful book that --

3 Books are often published as part of an exhibition,
4 and so it was the assistant curator who was responsible for
5 being a coauthor and for that exhibition. And so there's
6 wonderful images of the sort of history of how sportswear for
7 women developed.

8 MR. MALDONADO: Your Honor, may I approach the
9 witness?

10 THE COURT: Yes.

11 BY MR. MALDONADO:

12 Q. I'm handing you a document that's been marked as
13 Defendant's Exhibit 303.

14 Can you please tell us what that is?

15 A. Yes. This is a book, the name of it is Sporting Fashion
16 Outdoor Girls, 1800 to 1960, and it's based on images from that
17 exhibition.

18 MR. MALDONADO: OK. If we can take a look at --

19 If we can pull up Exhibit 303 on the screen, please.
20 Actually, I would like to offer the book into evidence, Exhibit
21 303.

22 MR. FLEMMING: Objection, hearsay, same grounds as the
23 book adidas attempted to offer.

24 THE COURT: I will receive the book only to the extent
25 of images that the witness refers to. The rest is not

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Arbuckle - Direct

1 received.

2 MR. MALDONADO: OK. Thank you, your Honor.

3 (Defendant's Exhibit 303 received in evidence)

4 BY MR. MALDONADO:

5 Q. If we can turn to page nine on the screen. You don't have
6 to look at the book, it will be on your screen.

7 Can you please describe the image that's shown here?

8 A. Yes. This is an image from the exhibition that appears in
9 the book, and it's a women's bathing suit from the early 1900s.

10 Q. Can you please describe the use of stripes on this women's
11 bathing suit?

12 A. Yes. There is parallel stripes at the hem of the top at
13 the arm hole and on the collar.

14 Q. How many stripes do you see?

15 A. Well, there's three parallel red stripes on the hem and
16 three at the collar and three at the arm hole.

17 Q. OK. If we can turn next to page -- what's 296?

18 MR. MALDONADO: Sorry, one second, your Honor.

19 To page 194 of the book.

20 Q. OK. Maybe describe the image that is on the screen now.

21 A. So this is an image of a woman's ice skating outfit from
22 the 1800s.

23 Q. And can you describe the use of stripes on this garment?

24 A. Yes. They are on the sleeve, which is a very long sleeve,
25 and certainly along the bustle. I can see that they are

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Arbuckle - Direct

1 somewhere in the bodice area, but I cannot see the detail.

2 Q. Let's move on to Exhibit 206, please.

3 Can you please describe what this is, first?

4 A. Yes. This is from the Smithsonian, and this is an example
5 of a varsity sweater.

6 Q. Is this an image that you captured?

7 A. It is.

8 Q. And does this image accurately reflect what you captured?

9 A. It does.

10 MR. MALDONADO: Your Honor, I would like to move in
11 206.

12 THE COURT: Same objection, same ruling, received.

13 (Defendant's Exhibit 206 received in evidence)

14 MR. MALDONADO: If we can publish it to the jury,
15 please.

16 Q. Ms. Arbuckle, if you could please describe what's shown
17 here?

18 A. Yes. So this --

19 Q. One second. Sorry.

20 OK. Go ahead.

21 A. So this is a varsity sweater and it includes the parallel
22 stripes on the shoulder and the sleeve. It also includes a
23 fraternity and an athlete's name.

24 Q. How many stripes do you see on this garment?

25 A. I see three parallel stripes.

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Arbuckle - Direct

1 Q. Where do you see those?

2 A. I see them on the shoulder and on the sleeve.

3 Q. OK. If we can next look at Defendant's Exhibit 200,
4 please.

5 Can you first identify what this is, please?

6 A. Yes. This is a varsity sweater from the Mississippi State
7 University archives.

8 Q. Is this an image that you captured?

9 A. Yes, it is.

10 Q. Does this accurately reflect what you captured?

11 A. Yes.

12 MR. MALDONADO: Your Honor, I would like to move in
13 200.

14 THE COURT: Ditto, ditto, received.

15 (Defendant's Exhibit 200 received in evidence)

16 Q. Please describe for the jury what is on the screen now.

17 A. So this is a varsity pullover sweater. It's from the early
18 1920s, and it shows the school letter on the front and three
19 parallel stripes on the sleeve.

20 Q. OK. Can we please turn to the next exhibit, 228.

21 Can you please describe generally what this is?

22 A. Yes. This is a capture of *Seventeen* magazine ad.

23 Q. Did you capture this image?

24 A. I did.

25 Q. And is it accurate?

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Arbuckle - Direct

1 A. Yes.

2 MR. MALDONADO: Your Honor, I offer 228.

3 THE COURT: Same objection, same ruling, received.

4 (Defendant's Exhibit 228 received in evidence)

5 Q. Can you please describe to the jury what is shown at the
6 bottom of that page?

7 A. So this is, as I shared, a Chanel ad, and it is a couple
8 where they are both wearing varsity sweaters. And this is
9 somewhere in the 1950s.

10 Q. Do you see stripes on the sweaters?

11 A. I do, on the sleeves.

12 Q. How many stripes do you see?

13 A. Three.

14 Q. Thank you.

15 Let's move on to Exhibit 257, please. And can you
16 please first describe what this is?

17 A. So this is from the Ralph Lauren website.

18 Q. Is this an image you captured?

19 A. Yes.

20 Q. Is it accurate?

21 A. Yes.

22 MR. MALDONADO: Your Honor, I would like to move in
23 257.

24 THE COURT: Same ruling, same objection, received.

25 (Defendant's Exhibit 257 received in evidence)

N1AsADI6

Arbuckle - Direct

1 Q. Can you please describe for the jury what is shown in this
2 image?

3 A. Yes. This is, you know, a current varsity-type sweater
4 that has two parallel stripes on the sleeve by Ralph Lauren.

5 Q. Thank you.

6 Let's move on to Exhibit 223, please.

7 Please describe what this is.

8 A. This is an image from the website *24S.com*.

9 Q. Is this an image that you captured?

10 A. Yes.

11 Q. Is it accurate?

12 A. Yes.

13 MR. MALDONADO: Your Honor, I move in 223.

14 THE COURT: Same objection, same rulings, received.

15 (Defendant's Exhibit 223 received in evidence)

16 Q. Can you please describe for the jury what is shown in this
17 image?

18 A. So, as I shared, this is a varsity jacket from the brand
19 Celine. And it's highlighted with stripes at the neck, the
20 sleeve, and the waist.

21 Q. How many stripes do you see at the neck?

22 A. I see three.

23 Q. And how many stripes do you see at the sleeves?

24 A. Four.

25 Q. Thank you.

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Arbuckle - Direct

1 Can we please move on to Exhibit 213.

2 THE COURT: Counsel, find someplace to interrupt just
3 so we can give the jury the midafternoon break.

4 MR. MALDONADO: OK. We'll do a couple more, and then
5 we'll take a break.

6 THE COURT: All right.

7 BY MR. MALDONADO:

8 Q. Let's move on to the next one. I think we said 213.

9 Yes. Can you please describe what this is generally?

10 A. Yes. This is from the Givenchy website.

11 Q. This is an image that you captured?

12 A. Yes.

13 Q. Is it a fair and accurate representation?

14 A. Yes.

15 MR. MALDONADO: I would like to move if 213, your
16 Honor.

17 THE COURT: Same objection, same ruling, received.

18 (Defendant's Exhibit 213 received in evidence)

19 Q. Please describe for the jury what is shown in this image.

20 A. It's a varsity jacket by Givenchy, and it is highlighted
21 with stripes at the neck, the waist, and the sleeve.

22 Q. And who is Givenchy?

23 A. A French luxury brand.

24 Q. And how many stripes do you see around the collar?

25 A. Two.

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Arbuckle - Direct

1 Q. And the sleeves?

2 A. Two.

3 Q. And the waist?

4 A. Two.

5 Q. And let's now look at Exhibit 227, please.

6 Can you tell us generally what this is?

7 A. This is captured from the Saint Laurent website.

8 Q. Did you capture this image?

9 A. Yes.

10 Q. Is it fair and accurate?

11 A. Yes.

12 MR. MALDONADO: Your Honor, I offer in 227.

13 THE COURT: Same objection, same rule, received.

14 (Defendant's Exhibit 227 received in evidence)

15 Q. Can you please describe for the jury what is shown in this
16 image?

17 A. Yes. This is another varsity jacket by a luxury French
18 company. And it has parallel stripes, two parallel stripes at
19 the sleeve, the waist, the neck, with an insert in the arm
20 hole.

21 MR. MALDONADO: Your Honor, this would be a convenient
22 place to break for our afternoon recess.

23 THE COURT: Very good. We'll take a 15-minute break.

24 (Continued on next page)

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Arbuckle - Direct

1 (Jury not present)

2 THE COURT: You can step down. We'll see you in
3 15 minutes.

4 THE WITNESS: Thank you.

5 (Witness temporarily excused)

6 THE COURT: So I want to spend at least a few minutes
7 on one part of the motion to dismiss, mainly punitive damages.

8 So what argument does plaintiff have that there should
9 be punitive damages?

10 MR. HENN: It overlaps substantially with the
11 willfulness and bad faith issue. Perhaps I should talk about
12 all of them --

13 THE COURT: OK.

14 MR. HENN: -- collectively.

15 First and foremost, I want to make sure that the court
16 does not loose sight against our claims against Grosgrain
17 products in considering willfulness, bad faith, or punitive
18 damages. The witnesses consistently, Mr. Browne himself
19 testified that their use of the Grosgrain on this product was
20 not his trademark, but instead was a design choice. He made
21 the choice to take his little ribbon that was supposed to be a
22 trademark here, he made the stripes fatter, identical to what
23 is in adidas' own guidelines about the width of stripes on
24 shoes, angled them forward. And with regard to the pants, he
25 stretched it out, made it wider.

1 So I'm going to talk about the four stripes, but I do
2 not want us to lose sight of the fact that with regard to the
3 Grosgrain, there's no discussion about the notion that they
4 sort of adopted that iteration as a mark and in good faith.
5 Those were design choices that the jury can infer were done
6 intentionally to bring it closer to adidas as part of the
7 effort to move into athletics, to expand athletic expression.

8 I want to put Grosgrain aside for a minute and return
9 to four bars. As your Honor is aware, the standard for bad
10 faith and willfulness in the trademark context is either that
11 the mark was adopted on the infringing goods to trade on the
12 goodwill of the mark owner, or that it was adopted for use on
13 the infringing goods with conscientious disregard or willful
14 blindness as to the rights of the mark owner.

15 THE COURT: Yes, and I'm glad you're addressing all
16 this, because this is another aspect of their motion.

17 But punitive damages goes well beyond what you've just
18 described for willfulness. Punitive damages requires something
19 that is so wanton and of such, if you will, public importance
20 that it requires the functional equivalent of a criminal
21 penalty. That's why it is called punitive damages opposed to
22 mere willfulness. The standard is, in my view, considerably
23 higher. That is why I was trying to limit it to that.

24 MR. HENN: Well, in order to sort of get to the point
25 of where we would argue that it is wanton and inappropriate

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Arbuckle - Direct

1 under the punitive damages standard, I sort of have to go
2 through the evidence on willfulness.

3 THE COURT: All right. Keep going.

4 MR. HENN: So the question before the court and before
5 the jury on the issues of all three of this -- willfulness, bad
6 faith, and punitives -- is whether Thom Browne, with regard to
7 the four bars, used that on the accused products in bad faith.
8 The key date and the key product is not back in 2008 when he
9 conceived of the four bars mark because we don't accuse the
10 product that was originally conceived of back at that point.
11 The key time is when it was used on each of the accused
12 products. Also kind of overlaps with progressive encroachment.
13 I'll get to that at the very end of this discussion of the
14 evidence.

15 But I want your Honor to think of an analogous
16 situation. McDonald's is known for the golden arches. If I go
17 and I create a watch company and on the face of the watch I put
18 a little golden M, and I go around selling my watches because I
19 adopted -- my name is Mc Dougall and I want my M on my watch.
20 The mere adoption of it on a watch might not give rise to
21 things like willfulness, bad faith, punitive damages.

22 But if I then, over time I go from watches and then I
23 decide I want to go into apparel. I decide, you know what,
24 I've got some extra money. I'm going to open a restaurant down
25 in TriBeCa, and I'll put my big M on it. Then the question for

1 the court and the jury is, at the moment that you moved into
2 those products, or in that case into those services, have you
3 acted willfully in bad faith and wanton.

4 So I don't want us to lose site and think, oh, well,
5 because adidas didn't show something back in 2006 about what
6 Thom Browne was thinking when he was adopting varsity stripes,
7 that's not the issue. It's when this comes under these
8 particular products.

9 Now what is the evidence? 2007, he gets a call. He's
10 made aware of the Three-Stripe Mark from adidas directly. His
11 lawyers, Pryor Cashman, provide him with a full summary of
12 adidas' trademark registrations and advise him in an e-mail
13 that apparently privilege was waived, that those rights cover
14 horizontal, vertical, and diagonal uses of stripes.

15 He, without bothering to ask Pryor Cashman, simply
16 adds a fourth stripe. He's already got Pryor Cashman on the
17 payroll. They've done a search, and he didn't ask them whether
18 it was OK. It's the *Hilfiger* case, second Circuit. When you
19 should be doing a search and you didn't do a search, the
20 evidence of willfulness, the Second Circuit has held that.

21 Next, he doesn't consider the fact that adding a
22 fourth stripe creates three stripes, negative space. It
23 doesn't even consider that aspect. This witness just now
24 almost, almost admitted that the product either had three red
25 stripes or had four white stripes. She sort of caught herself

1 because the fact is the reason four stripes is an
2 infringement -- and asking his lawyers would have made this
3 very clear -- is that four creates the impression of three.
4 We've seen that in the survey evidence and otherwise.

5 THE COURT: I'm a little skeptical of this last
6 argument. I'm not sure what your evidence is on this. I am
7 doubtful that, given the basic principles of Gestalt psychiatry
8 and psychology, that the average consumer would perceive that
9 as anything other than four stripes.

10 MR. HENN: We actually have the empirical data in the
11 record that either proves the Gestalt theory or it shows that
12 people did Count Three. Remember the verbatims in the Poret
13 survey. Everyone looked at that and said, I saw three stripes,
14 I saw three stripes, I saw three stripes. There is only two
15 explanations. Either they are brain-triggered to adidas and
16 the three stripes is so associated with it, they gave three
17 stripes as a response, or they were looking at the negative
18 space.

19 THE COURT: All right. Anyway, keep going.

20 MR. HENN: So all of that was done, we believe, in
21 willful blindness because he had the trademark reports. He had
22 the opinion of counsel that said, they own diagonal,
23 horizontal, and vertical. And instead of bothering to say,
24 Hey, can I put a fourth stripe on, he didn't. That's the
25 definition of conscientious disregard, knowing that you can get

1 an answer and choosing not to get an answer.

2 That is back in time. What makes this case even more
3 an example of willfulness is what has happened since then,
4 which is -- let's take it out of the laches context entirely.
5 Let's say that everything he did up to 2018, when we objected
6 in 2018, can't be willful. That's not the case, but let's just
7 say that that is the case.

8 From the moment of 2018 forward, all of the products
9 that he chose to release after that point the jury could very
10 well decide that was willful. You not only had the trademark
11 registrations, you knew it covered all these things. Adidas
12 had specifically reached out about four stripes and about the
13 Grosgrain, and instead of stopping where you were and keeping
14 the same line, waiting for the court to figure it out or
15 otherwise. No, no, we have a total product expansion that goes
16 into all kinds of new products, culminating in the 2020 release
17 of the entire compression line of products, which he then goes
18 out to the media, and the *Vogue* article that's in the record
19 where he said, I run eight miles a day.

20 THE COURT: Plus in that argument is the assumption
21 that they clearly knew they were infringing at that point.
22 Because if they didn't, then their reaction is simply we don't
23 agree with you. We don't think we're infringing. Get lost.

24 MR. HENN: So I would encourage the court to read the
25 *Victor Knox* case, which is a Second Circuit affirming your

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Arbuckle - Direct

1 Honor. And in that case, you found, or at least there was a
2 finding of willfulness as a result of the defendant continuing
3 to move forward after being put on notice by the plaintiff.
4 Obviously there was a dispute. They challenged it in court.
5 They didn't know that it was infringing. But the court
6 ultimately said if you expand after you're told of a possible
7 infringement, you essentially do so at your own risk, and the
8 jury shouldn't be precluded from weighing the evidence --

9 THE COURT: All right. You're citing weak authority,
10 of course.

11 MR. HENN: I found it very suspect.

12 THE COURT: But I'll take a look at that. I want to
13 give everyone five minutes before we resume. This argument is
14 not over, by any means. We will continue it either today or
15 tomorrow.

16 (Recess)

17 THE COURT: One last thing for counsel to think about.
18 I'm not sure why willfulness is still in this case,
19 putting aside this is separate from punitive damages and good
20 faith. But we'll discuss that tomorrow, but...

21 MR. MALDONADO: Thank you.

22 THE COURT: I'm unclear why it's still in the case at
23 all. All right.

24 (Continued on next page)

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Arbuckle - Direct

1 (Jury present)

2 MR. MALDONADO: Your Honor, to save some time, the
3 parties have agreed that the next three exhibits will be
4 offered into evidence: 204 --

5 THE COURT: Oh, my gosh. I'm going to faint.

6 MR. MALDONADO: 204, 269, and 266, subject to the same
7 objections and the same rulings.

8 Is that OK?

9 THE COURT: That's fine. Received.

10 (Defendant's Exhibits 204, 269, and 266 received in
11 evidence)

12 MR. MALDONADO: Thank you.

13 BY MR. MALDONADO:

14 Q. Let's pull up Exhibit 204, please.

15 Ms. Arbuckle, can you please describe what's on the
16 screen here?

17 A. Yes. This is from the website Mr. Porter, and it's a
18 Burberry varsity jacket.

19 Q. Can you zoom in on the jacket, please.

20 Can you please describe the use of stripes on this
21 jacket?

22 A. They are at the neck, the sleeve, and the hem. There is
23 three at the sleeve, it appears more like two at the waist, and
24 two at the neck.

25 Q. And who is Burberry?

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Arbuckle - Direct

1 A. Burberry is a British luxury brand.

2 Q. Let's look at the next exhibit, 269.

3 Can you please describe what we see here?

4 A. This is from the Celine website. This is a Celine track
5 suit, jogging jacket.

6 Q. OK. Can you describe the use of stripes on this?

7 A. Um, this has parallel stripes across the shoulder and down
8 the sleeve.

9 Q. How many stripes do you see?

10 A. Um, I see two on a white stripe.

11 Q. OK. And who is Celine?

12 A. Celine is a luxury French brand.

13 Q. Turning now to Exhibit 266.

14 Can you please describe what's shown here?

15 A. So this is from the Bloomingdale's site, and this is a pair
16 of Karl Lagerfeld jogging pant.

17 Q. Who is Karl Lagerfeld?

18 A. Karl Lagerfeld is a famous luxury designer, Chanel --
19 associated with Chanel. And this jogging pant has parallel
20 stripes down the outside leg of the pant.

21 Q. Thank you, Ms. Arbuckle.

22 We would next like to turn to Plaintiff's Exhibit
23 1228.

24 Let's just publish this for the witness.

25 Ms. Arbuckle, have you seen this exhibit before?

N1AsADI6

Arbuckle - Direct

1 A. I have.

2 Q. And are these images that we either captured for you or on
3 your behalf?

4 A. They were.

5 Q. And are they all accurate representations of the images
6 that were captured?

7 A. They are.

8 MR. MALDONADO: Your Honor, I would like to move
9 Plaintiff's Exhibit 1228 into evidence.

10 MR. FLEMMING: We have several objections and would
11 need a sidebar on this one.

12 THE COURT: OK.

13 (Continued on next page)

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N1AsADI6

Arbuckle - Direct

1 (At the sidebar)

2 MR. FLEMMING: Several issues.

3 Number one, there is an article in this long exhibit
4 that's pure hearsay about how adidas supposedly bought its
5 trademark rights from someone else.

6 MR. MALDONADO: We can take that out.

7 MR. FLEMMING: Another issue is that there are
8 annotations made by counsel on many of the products with
9 numbers that make it look like there were up to 700 products,
10 when actually there are just a couple dozen in the first
11 several pages. Ms. Arbuckle didn't make those annotations.
12 They just said third-party product number 267, so that is
13 misleading and prejudicial.

14 Personal knowledge for a lot of them. What the
15 witness just said is that she thinks that some of these may
16 have been captured on her behalf, so not by her personally.
17 They are also just screenshots with no context.

18 THE COURT: Sustained.

19 (Continued on next page)

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N1AsADI6

Arbuckle - Cross

1 (In open court)

2 MR. MALDONADO: I have no further questions, your
3 Honor.

4 THE COURT: Cross-examination.

5 MR. FLEMMING: Thank you, your Honor.

6 CROSS-EXAMINATION

7 BY MR. FLEMMING:

8 Q. Hello, Ms. Arbuckle.

9 A. Good afternoon.

10 Q. You talked on your direct testimony about some historical
11 uses of stripes, correct?

12 A. I did, yes.

13 Q. And you did some research to find those historical uses?

14 A. I did.

15 Q. You went to some museums?

16 A. I went to museum sites.

17 Q. So museum websites?

18 A. Some museum sites, as well as the museum at the Fashion
19 Institute of Technology and the special collections at the
20 library, yes.

21 Q. And that the special collections included rare books, you
22 said?

23 A. Yes.

24 Q. And oral histories, you said?

25 A. Correct.

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Arbuckle - Cross

1 Q. And some of your examples went back to the 1800s, correct?

2 A. That is correct.

3 Q. There were several examples that went back to the 1800s?

4 A. That is correct.

5 Q. Let's show the witness, just the witness, what's been
6 marked as Exhibit 1330.

7 THE COURT: I knew we would get there eventually, to a
8 number over 1000.

9 MR. FLEMMING: We offer this into evidence.

10 THE COURT: Any objection?

11 MR. MALDONADO: No objection.

12 THE COURT: Received.

13 (Plaintiff's Exhibit 1330 received in evidence)

14 BY MR. FLEMMING:

15 Q. Ms. Arbuckle, you reviewed the complaint in this action in
16 forming your opinions in this case, correct?

17 A. I did.

18 Q. And you reviewed the adidas trademark registrations that
19 were attached to the complaint, correct?

20 A. That is correct.

21 Q. And we are looking at one of those registrations?

22 A. You are.

23 Q. And let's look at the left-hand side of the page.

24 Do you see under the registration number it says
25 registered and it gives a date March 8, 2016?

NlAsADI6

Arbuckle - Cross

1 A. Correct.

2 Q. So the United States Patent and Trademark office granted
3 this registration to adidas hundreds of years after many of
4 your examples that you gave today, is that correct?

5 A. That is correct.

6 Q. You can take that down. Thank you.

7 You are a fashion designer, correct?

8 A. I am.

9 Q. But you haven't personally designed any clothing since
10 2004?

11 A. That is correct.

12 Q. And you've worked at the Fashion Institute of Technology,
13 FIT, for many years?

14 A. I have.

15 Q. And you've been in administrative roles there since 2005?

16 A. That's correct.

17 Q. You haven't taught or designed any courses at FIT since
18 2005, is that correct?

19 A. Well, as --

20 Q. You haven't taught or designed any courses at FIT since
21 2005?

22 A. I have not.

23 Q. So you talked earlier about some, what you called, varsity
24 jackets, right?

25 A. I did.

N1AsADI6

Arbuckle - Cross

1 Q. And you don't know whether consumers associate stripes with
2 varsity jackets, right?

3 MR. MALDONADO: Objection, your Honor.

4 THE COURT: Sustained.

5 Q. Thom Browne offers varsity jackets, correct?

6 A. He does.

7 Q. And he offers them without stripes on the sleeves?

8 A. Correct.

9 Q. Let's bring up to the witness Plaintiff's Exhibit 826 and
10 go to page two.

11 MR. FLEMMING: We offer this into evidence as well.

12 MR. MALDONADO: Objection, your Honor.

13 May we be heard at sidebar?

14 THE COURT: OK.

15 (Continued on next page)

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Arbuckle - Cross

1 (At the sidebar)

2 MR. MALDONADO: Your Honor.

3 THE COURT: So if I were defense counsel, I don't know
4 that I would be objecting, since plaintiff's counsel seems to
5 be moving ever further towards opening the door to much of what
6 I excluded at his request previously. But, of course, that's
7 up to you.

8 So what's the objection?

9 MR. MALDONADO: I'll withdraw my objection.

10 Thank you, your Honor.

11 THE COURT: But wait a minute.

12 MR. MALDONADO: I'm sorry.

13 THE COURT: I'm sorry. So, I think, what's the
14 question you're going to put about this particular exhibit?

15 MR. FLEMMING: Only that there are no stripes on the
16 sleeve.

17 THE COURT: All right. That doesn't, by itself,
18 doesn't open the door, but you're getting very close.

19 MR. FLEMMING: Understood. I'll be done after this.

20 THE COURT: All right.

21 (Continued on next page)

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Arbuckle - Cross

1 (In open court)

2 MR. FLEMMING: Can we publish to the jury, your Honor.

3 THE COURT: Yes. It's received.

4 (Plaintiff's Exhibit 826 received in evidence)

5 BY MR. FLEMMING:

6 Q. Ms. Arbuckle, this is a page from the Thom Browne website,
7 correct?

8 A. That is correct.

9 Q. And it shows a Thom Browne jacket?

10 A. It does.

11 Q. The name is reversed shearling varsity jacket, is that
12 right?

13 A. Correct.

14 Q. And there are no stripes or bars on the sleeve of this
15 varsity jacket?

16 A. There are not.

17 MR. FLEMMING: No further questions.

18 THE COURT: Anything else?

19 MR. MALDONADO: I don't have any further, your Honor.

20 THE COURT: Thank you very much. You may step down.

21 THE WITNESS: Thank you.

22 (Witness excused)

23 THE COURT: Please call your next witness.

24 MS. SAYOUR: Your Honor, we call Dr. Joel Steckel.

25 THE DEPUTY CLERK: Please take the witness stand.

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Steckel - Direct

1 Please remain standing and raise your right hand.

2 JOEL STECKEL,

3 called as a witness by the Defendant,

4 having been duly sworn, testified as follows:

5 Please be seated. Draw close to the microphone.

6 State your name and spell it slowly for the record.

7 Thank you very much.

8 THE WITNESS: My name is Joel Steckel.

9 THE DEPUTY CLERK: Please spell it.

10 THE WITNESS: J-o-e-l S-t-e-c-k-e-l.

11 THE COURT: Counsel.

12 DIRECT EXAMINATION

13 BY MS. SAYOUR:

14 Q. Good afternoon, Dr. Steckel.

15 A. Good afternoon.

16 Q. Would you please introduce yourself to the ladies and
17 gentlemen of the jury by telling them where you work and what
18 you do?

19 A. I'm a professor of marketing at the Stern School of
20 Business at New York University. Currently I'm on sabbatical,
21 and I'm a visiting scholar at the law school of the University
22 of Pennsylvania.

23 MS. SAYOUR: We have some demonstratives that we would
24 like to bring up to help with today's discussion.

25 With your permission, your Honor, may we publish those

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Steckel - Direct

1 to the jury.

2 THE COURT: Yes. Let me remind the jury for the
3 umpteenth time. Demonstratives are not evidence. That won't
4 be given to you when you start your deliberations. They are
5 just to help follow the testimony as it was given.

6 BY MS. SAYOUR:

7 Q. Dr. Steckel, can you go through your educational background
8 starting with your undergrad degree?

9 A. Sure. I have a bachelor's degree in mathematics from
10 Columbia University, where I was elected to Phi Beta Kappa and
11 I graduated Summa Cum Laude. Then I went to graduate school at
12 the Wharton School of the University of Pennsylvania, where I
13 received three degrees: An MBA, a master of arts in
14 statistics, and my Ph.D. degree was awarded jointly by the
15 departments of marketing and statistics.

16 Q. And once you got your Ph.D. degree, what did you do next?

17 A. I became a professor.

18 Q. And why don't we pull up the next page.

19 Thank you. Are these --

20 THE COURT: Given your educational background, you
21 didn't have any choice, did you?

22 THE WITNESS: Um, no. That's what we do. When you
23 get a Ph.D. from one of the top schools, you become a
24 professor. That's the normal career path. It's like when you
25 go to medical school, you become a doctor.

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Steckel - Direct

1 MS. SAYOUR: That's fair enough.

2 THE COURT: If you go to law school, you become a
3 judge.

4 Go ahead, counsel.

5 MS. SAYOUR: I wasn't going to say it, your Honor.

6 BY MS. SAYOUR:

7 Q. Are these some of the institutions where you've held
8 academic positions?

9 A. I think they are all of them, actually. Yes, in either a
10 professor or visiting professor at all of these institutions,
11 with the exception of the Penn Law School, where I'm just a
12 visiting scholar.

13 Q. Can you tell the jury some of the kinds of classes that
14 you've taught?

15 A. Sure. I've taught a wide variety of classes. I've been a
16 professor for about 40 years now. I have taught -- recently,
17 the courses I've taught the most often are introductory
18 marketing and introductory research methods to Ph.D. students.
19 But I've taught courses in pricing and brand strategy and
20 strategic marketing and brand planning, and all sorts of
21 courses on quantitative methods in marketing.

22 Q. I think you indicated that you're currently a professor at
23 NYU?

24 A. Yes.

25 Q. And what classes are you currently teaching?

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Steckel - Direct

1 A. I'm not teaching any currently because I'm on sabbatical.

2 Q. And that's at the Penn Law?

3 A. Yes.

4 Q. What about consulting work, have you done any consulting
5 work?

6 A. Throughout the years, yes. Early in my career, I did a lot
7 of work on analyzing data for companies and instructing them on
8 what they could make of the data that they collect within the
9 normal course of business, and how they could measure their
10 customer preferences, things like that.

11 More recently, my work has been more or less focused
12 on doing expert witness work in litigation such as this one.

13 Q. So have you testified as an expert in other cases?

14 A. I have.

15 Q. And what kinds of cases were those?

16 A. A lot of trademark cases and trade dress cases, antitrust,
17 patent, a wide variety of cases. When you have training in
18 statistical methodology, that equips you to be able to apply
19 those skills in a wide variety of contexts.

20 Q. I know sometimes professors write a lot.

21 Have you published any journal articles or on
22 marketing and branding?

23 A. I have. And sometimes when they come in the mail, my wife
24 says to me, Honey, we have one of those silly little magazines
25 that only 50 people read again.

N1AsADI6

Steckel - Direct

1 Q. What about books?

2 A. Yes. I'm the author of four books, an author of four
3 books, coauthor, I like to work with my colleagues, and I have
4 another book coming out this summer, an edited volume entitled
5 *Legal Applications of Marketing Theory*.

6 Q. Have you given any presentations on marketing and branding?

7 A. Oh, my gosh, probably in the neighborhood of 100 over my
8 career.

9 Q. If we can pull up DDX 408.

10 Dr. Steckel, do you know what this is?

11 A. This is the first page of my c.v. My resume, if you will.

12 MS. SAYOUR: Your Honor, we would like to offer this
13 exhibit into evidence.

14 MR. HENN: No objection.

15 THE COURT: Received.

16 (Defendant's Exhibit 408 received in evidence)

17 MS. SAYOUR: Publish it.

18 BY MS. SAYOUR:

19 Q. I know this is a long 15-page document, and I don't want to
20 go through it in detail.

21 But can you tell us whether this document is an
22 accurate summary of your professional and educational
23 background?

24 You can scroll through it?

25 A. I believe it is. It's supposed to be anyway.

1 Q. If we can turn to page 12.

2 Can you explain -- let's go back to 11. Can you
3 explain the editorial service category on the bottom of this
4 page?

5 A. The editorial service category, I think, is actually the
6 one that is most relevant to this matter. It's my -- it
7 reflects my participation over the years in the peer-review
8 process. In those silly little magazines that my wife
9 complains about, those magazines, or journals as we call them,
10 publish only about 10 percent of the articles that are
11 submitted to them. They go through a review process, and in
12 particular, for six and a half years, or actually a little
13 more, I served as an editor-in-chief of one of those journals.
14 And my work there is actually quite similar to my work here
15 today.

16 Q. I know you said you believe it's relevant to this matter.

17 Why do you believe that?

18 A. Well, what an editor does at these journals, the editor is
19 ultimately the person who decides whether or not a particular
20 article or particular manuscript gets published in the journal,
21 actually goes into print. There are really two categories or
22 two sets of criteria that the editor has to use.

23 MR. HENN: Objection, outside the scope of the report.

24 THE COURT: Well, I think it's all unnecessary.

25 Sustained.

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Steckel - Direct

1 Q. Dr. Steckel, before we get to your opinions, can you tell
2 us what your assignment was in this case?

3 A. I was asked to provide opinions and commentary on the
4 report submitted by Dr. Erich Joachimsthaler in this case, and
5 I was asked to do it from a marketing and scientific
6 perspective.

7 Q. If we can pull up DDX 6 and go to slide four.

8 Dr. Steckel, can you explain your conclusions to the
9 jury about Dr. Joachimsthaler's report with reference to the
10 demonstrative on the screen?

11 A. My overall conclusion is listed at the top there, that his
12 opinions lack scientific basis and are grounded in baseless and
13 incorrect assumptions and a lot of speculation. To put it
14 simply, his report was a lot of complicated hand-waving as
15 opposed to scientific investigation.

16 Q. If we can start with the first one on the side, the
17 Three-Stripe Mark is used inconsistently.

18 Can you explain what you mean by that?

19 A. Yes. The Three-Stripe Mark that adidas is asserting in
20 this matter is not always used the same way. Indeed, at least
21 in Dr. Joachimsthaler's report, it's reflected at three
22 different ways: In the Trefoil, the Badge of Sport, and with
23 the little empirical study he did where the three stripes were
24 going down the sleeves. I forgot if it was a sweatshirt or a
25 long-sleeve T-shirt. So at least even within his report, three

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Steckel - Direct

1 stripes were used in at least three different ways.

2 I'm sorry. Do you want me to go on, counsel?

3 Q. I don't know if you had something to add to that, but...

4 A. No. I was going to give a brief description of each of the
5 four.

6 Q. You can, but we can do it one at a time.

7 Why don't we break it down.

8 A. OK.

9 Q. Can you pull up DDX 23.

10 Dr. Steckel, did you review this document in
11 connection with your report?

12 A. I did. It's a set of branding guidelines for adidas.

13 MS. SAYOUR: Your Honor, we would like to offer this
14 exhibit into evidence.

15 MR. HENN: It's already in evidence, your Honor.

16 THE COURT: Yes, I think it's already in.

17 MS. SAYOUR: My apologies.

18 Can we publish it to the jury?

19 THE COURT: Yes.

20 MS. SAYOUR: If we can turn to page two.

21 BY MS. SAYOUR:

22 Q. Dr. Steckel, did you review this page in connection with
23 your opinions?

24 A. I did.

25 Q. And can you explain this page?

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Steckel - Direct

1 A. Sure. This is a page out of the branding guidelines, and
2 it articulates a common belief and common principle across many
3 companies that brands need to be presented to their customer
4 base or potential customer base consistently so that the
5 customers can more easily form expectations of what they will
6 receive when they purchase a product issued by the company.

7 Q. What does using a mark inconsistently do to the strength of
8 a brand?

9 MR. HENN: Objection, your Honor.

10 Sidebar, please.

11 THE COURT: All right.

12 (Continued on next page)

1 (At the sidebar)

2 MR. HENN: Your Honor, this witness has a multi-page
3 report. He has one paragraph that references inconsistent
4 branding, brand usage, and at his deposition I specifically
5 asked whether he was going to offer any opinions on this
6 subject.

7 Do you have an opinion one way or the other as to
8 whether the purported inconsistent use of the Three-Stripe Mark
9 has, in fact, limited the strength of adidas' brand assets?

10 His answer: I do not. I haven't tested it. I
11 haven't done the work.

12 So he should not be able to offer --

13 MS. SAYOUR: I'm not going to ask him -- he obviously
14 testified he didn't do the work. I simply asked, the question
15 is straight in his report, whether inconsistency can provide
16 obstacles.

17 THE COURT: I'm having trouble hearing.

18 MS. SAYOUR: Whether inconsistencies can provide
19 obstacles on the ultimate issue whether it is limited.

20 THE COURT: Sustained.

21 (Continued on next page)

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Steckel - Direct

1 (In open court)

2 BY MS. SAYOUR:

3 Q. We can go back to DDX 6 and turn to page four. The second
4 point.

5 Dr. Steckel, can you explain what you mean when you
6 say that the adidas brand associations are speculative in the
7 context of Dr. Joachimsthaler's report?

8 A. Yes. So as Dr. Joachimsthaler described in his report,
9 brand associations are things that come to consumer's mind when
10 they see a brand name or a logo or some indicia of the brand
11 itself. If those are things that come to a consumer's mind,
12 the best source of determining what the relevant brand
13 associations are, are the consumers. It's what they think of
14 when they see adidas or three stripes or anything.

15 In his report, Dr. Joachimsthaler does not really rely
16 on consumer input. What he does is essentially use his own
17 imagination and intuition to come up with a list of
18 associations that he does not verify by actually asking
19 consumers.

20 To be totally fair, though, to Dr. Joachimsthaler, one
21 of the things he does do is he takes some associations that are
22 described in adidas documents that may or may not come from
23 consumer input, but he doesn't know where those documents get
24 those associations from. In particular, the documents don't
25 describe any process that was used to obtain those

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Steckel - Direct

1 associations.

2 Furthermore, some of those documents that he relies
3 upon are inconsistent in the associations that they present.

4 Furthermore -- well, I'll stop there.

5 Q. Thank you.

6 A. I'll stop there. I don't want counsel to object too
7 frequently.

8 Q. What are the brand associations Dr. Joachimsthaler
9 identified?

10 A. Well, as I read through his report, I came up with
11 approximately 28 associations. Um, and that was through
12 reading through a long text and trying to write them down as I
13 encountered each one.

14 So according to Dr. Joachimsthaler's report, the
15 adidas brand means a lot of things to a lot of people. But,
16 you know, if you try to be too many things to too many people,
17 then maybe you end up being nothing. And without getting
18 consumer input, without any empirical evidence, it's hard to
19 verify that any of those associations actually exists.

20 Furthermore, Dr. Joachimsthaler's report describes the
21 principle that in order to be effective, associations have to
22 have three characteristics: They have to be strong, they have
23 to be favorable, and they have to be unique. And that's a
24 common set of three criteria that branding scholars point to
25 when trying to identify powerful brands, that they have strong,

1 favorable, and unique associations.

2 The associations --

3 MR. HENN: Objection, narrative. Maybe a question?

4 THE COURT: Well, I'm going to allow it. I think it's
5 within the context of the overall question, which was, what are
6 the problems with the other witness's report.

7 So you may go ahead.

8 THE WITNESS: Thank you.

9 A. The documents that Dr. Joachimsthaler relied upon not only
10 describe associations for adidas, they describe associations
11 for Nike, too, and all the associations that he says
12 differentiate adidas in the marketplace are dwarfed by the
13 degree to which those associations also belong to Nike.

14 So, for example, Dr. Joachimsthaler talks about adidas
15 is a performance product, is a performance brand. Well, those
16 documents will tell you that it's less of a performance brand
17 than Nike. Similarly with style and authenticity, and so --

18 THE COURT: I think that we need now another question.

19 THE WITNESS: I was finished anyway.

20 THE COURT: That's really interesting.

21 THE WITNESS: That's what my students say.

22 BY MS. SAYOUR:

23 Q. Whether it comes to brand associations, what is your
24 opinion about what Dr. Joachimsthaler did?

25 A. Actually, my opinion is more directed to what he didn't do,

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Steckel - Direct

1 and what he didn't do is collect any empirical evidence as to
2 the -- of his own as to the associations that he says drive the
3 adidas brand.

4 Q. How do you weaken brand associations, Dr. Steckel?

5 A. That's a really good question, and it's a question that
6 current research is investigating. In principle, in theory,
7 you can weaken brand associations by adding a new and desirable
8 association to a particular brand, or maybe you can have
9 another brand that shares an important association, making it
10 less unique. But the ability to do that and whether or not
11 that happens, depends on a particular brand.

12 I did some studies on Mercedes and Infiniti, two
13 brands, and Mercedes probably being the stronger brand, where I
14 was able to weaken the associations to Infiniti, but not able
15 to weaken the associations to Mercedes. And that's why you
16 really need empirical evidence. If you're going to talk about
17 how a brand may get weakened by weakening its associations.
18 Mercedes was very resistant and Infiniti much less so.

19 Q. If we can turn back to DDX 6 and move on to point three.
20 That's no evidence that Thom Browne and adidas are competitors.

21 Do you have an understanding of how Dr. Joachimsthaler
22 has defined the area of competition for Thom Browne and adidas?

23 A. As I understand Dr. Joachimsthaler's report, he described
24 Thom Browne and adidas as competitors in the athleisure
25 segment. That falls into a very common and dangerous trap that

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Steckel - Direct

1 people often fall into when they are describing competition.
2 He's describing competition based on physical features that
3 because they both produced athleisure items, they are therefore
4 competitors.

5 Well, if you look at it that way, then Peter Luger and
6 McDonald's are competitors because they both sell hamburgers.
7 Rolls-Royce and Hyundai are competitors because they both
8 manufacturer cars. The real key to identifying competition is
9 to recognize that people don't buy products, they buy benefits.

10 And if, for example, Thom Browne sells to people who
11 want the benefit, um, the self-expressive benefit of being
12 exclusive, then Thom Browne's competitors are going to be other
13 products athleisure and, otherwise, that people might buy for
14 that same benefit.

15 Q. If we can turn to the fourth point, no empirical evidence
16 of brand harm.

17 But before we do that, can you describe what empirical
18 evidence is?

19 A. Empirical evidence is evidence based on neutral, objective,
20 and systematically collected observations that provide a basis
21 for the conclusion.

22 Q. Why do you need it?

23 A. Well, empirical evidence is the cornerstone of scientific
24 inquiry. You need it so that in order to establish an opinion
25 as scientific and not speculative. Without empirical evidence

1 and just hearing somebody's opinion, then the basis for that
2 opinion is what I often refer to as "because I said so."

3 Q. So what is your response to Dr. Joachimsthaler's opinions
4 on harm to the adidas brand because of Thom Browne?

5 A. It's speculative. There is no empirical evidence. It's
6 overly complicated by some jargon about associative networks
7 interfering, overlapping, blurring, etc. And he has no
8 empirical evidence other than his own imagination that that is
9 what is happening.

10 Q. I think you understand that plaintiff alleges that
11 Mr. Poret has proffered a survey that is empirical evidence?

12 A. Well, I have not examined Mr. Poret's survey, but I do
13 understand that it is supposedly -- or the proffer is that it
14 indicates post-sale confusion.

15 Post-sale confusion is really different.

16 MR. HENN: Objection, outside the scope. He's just
17 said he didn't look at the survey.

18 THE COURT: No, I think he's on to a different point
19 now.

20 Overruled.

21 A. Post-sale confusion is a construct that's different than
22 the type of brand harm that Dr. Joachimsthaler was talking
23 about in his report.

24 Q. So in your opinion, is Mr. Poret's report empirical
25 evidence of harm to the adidas brand?

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Steckel - Cross

1 A. No.

2 MS. SAYOUR: I have no further questions.

3 THE COURT: Cross-examination.

4 CROSS-EXAMINATION

5 BY MR. HENN:

6 Q. Hello, Dr. Steckel.

7 A. Good afternoon, Mr. Henn. It's good to see you again.

8 Q. It's good to see you again.

9 THE COURT: Well, if you guys want to go out and have
10 a drink, I don't want to continue with this trial.

11 THE WITNESS: You can join us.

12 BY MR. HENN:

13 Q. You critiqued Dr. Joachimsthaler for doing, I think you
14 said, hand-waving and not basing his opinion on science.

15 Is that a fair summary of what you said?

16 A. I think that's fair, yes.

17 Q. And you have a master's and Ph.D.s in statistics, and you
18 have taught quantitative methods; yes?

19 A. Among other things.

20 Q. But in this case you didn't do any surveys, did you?

21 A. No, that was not per my assignment.

22 Q. You didn't to any of your own empirical research to measure
23 whether there's an impact from what Thom Browne is doing, did
24 you?

25 A. That's right. It was not my assignment.

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Steckel - Cross

1 Q. No one even asked you to look at whether what Thom Browne
2 is doing doesn't hurt adidas, did they?

3 A. That's right.

4 Q. And you're not offering any opinion here that what Thom
5 Browne is doing doesn't hurt adidas, correct?

6 A. Oh, that's a really good question and a really good point.
7 My assignment was to comment on Dr. Joachimsthaler's analysis,
8 not on the subject matter of the case.

9 Q. So, in other words, you're not offering an opinion here
10 today as an expert that what Thom Browne has done did not harm
11 adidas, correct?

12 A. That is correct.

13 Q. And you mentioned in your direct that you designed this
14 whole study to measure Mercedes and Infiniti and what the
15 impact might be on those brands in the context of dilution,
16 correct?

17 A. Yes, that was academic research.

18 Q. But you didn't run that study here to do any measurement
19 with regard to adidas and Thom Browne?

20 A. That is correct, I did not.

21 Q. But Dr. Joachimsthaler is doing the hand-waving?

22 A. Yes.

23 Q. OK. You also have no opinion in this case as to whether
24 the Three-Stripe Mark is or is not similar to the four bars or
25 the Grosgrain, correct?

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Steckel - Cross

1 A. Oh, that is correct. I don't have that opinion, and that's
2 another thing Dr. Joachimsthaler hand-waves about, whether the
3 Three-Stripe Mark or the three stripes is similar to the Thom
4 Browne mark. He just assumes it is.

5 Q. Well, you would agree that similarity is an empirical
6 question that can be tested with a survey, right?

7 A. I do.

8 Q. And yet you didn't even look at Mr. Poret's survey?

9 A. Because -- that's right. I didn't look at his survey
10 because it was about a different issue than the one
11 Dr. Joachimsthaler opined on.

12 Q. Well, you would agree with me that if you show someone a
13 Thom Browne product and you ask them who puts it out and they
14 say adidas, that they obviously thought the stripes were
15 similar, right?

16 A. I think that's a matter of logic, but not necessarily.
17 Someone could think that all products of that type are put out
18 by adidas.

19 Q. And that's why an empirical research, we have a control to
20 solve for that, right?

21 A. In a well-designed study, I think that's fair, yeah.

22 Q. And so then you would be able to isolate the active
23 ingredient, if you will, and see whether that is what is
24 causing the confusion?

25 A. Well, as I understood Dr. Joachimsthaler's report was about

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Steckel - Cross

1 dilution and brand weakening, not confusion, and that's why I
2 didn't look at Mr. Poret's study.

3 Q. You understand that in order for someone to see a Thom
4 Browne product and say adidas put that out, that they had to
5 necessarily activate their adidas memory network?

6 MS. SAYOUR: Objection, outside the scope.

7 A. Yeah, that's --

8 THE COURT: Wait a minute. There's an objection.

9 THE WITNESS: Sorry.

10 THE COURT: Overruled.

11 A. I'm sorry. Can you repeat the question, please?

12 Q. Sure. We're talking about empirical evidence and a
13 situation in which a survey is conducted and respondents are
14 exposed to Thom Browne's products, and they say adidas put it
15 out.

16 You would agree that those respondents necessarily
17 activated their adidas memory network, correct?

18 A. Not necessarily. They could have just activated an adidas
19 node that was in some memory network. But, you know, I don't
20 think the -- I don't necessarily subscribe to the situation
21 that you're describing.

22 Q. Well, let's talk about some of the principles that you say
23 are mere speculation in Dr. Joachimsthaler's opinion.

24 First, you agree with me that Gestalt principles are
25 well-established?

N1AsADI6

Steckel - Cross

1 A. I think there's a branch of psychology called Gestalt
2 psychology that is totally unnecessary to analyze the
3 situations in this case.

4 Q. My question, sir, is do you agree that Gestalt principles
5 are well-established in psychology?

6 A. I think it's a branch of psychology that has gained fairly
7 widespread acceptance.

8 Q. And it's, in fact, well-established, isn't it?

9 THE COURT: Well, no objection was raised.

10 Are you a psychologist?

11 THE WITNESS: No.

12 THE COURT: All right. The silently made objection is
13 sustained.

14 MR. HENN: Fair enough.

15 BY MR. HENN:

16 Q. Well, let's talk about brands.

17 You agree that strong associations to the brand in
18 memory create a brand's image?

19 A. Yes.

20 Q. And that the most important associations reflect attributes
21 and benefits?

22 A. Yes. But I'm not sure I put them on equal footing.

23 Q. You agree that, I think you said on direct, people don't
24 buy products, they buy benefits, right?

25 A. I did.

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Steckel - Cross

1 Q. Including self-expressive benefits?

2 A. Absolutely.

3 Q. And that basically means if I want to feel good about
4 myself, I might buy a red sports car because I just turned 50,
5 and that makes me feel good. That's a self-expressive benefit
6 from the car?

7 A. Well, self-expressive benefit would be more specific.
8 Might make me feel young.

9 Q. Fair. But that's what you mean when you say benefit?

10 A. That's one class of benefit, just like drilling a hole in
11 the wall is another class of benefits for Black & Decker
12 drills.

13 Q. And you agree with Dr. Joachimsthaler that adidas and Thom
14 Browne offer their respective consumers different self-
15 expressive benefits, correct?

16 A. Well, I think that's likely, but I think one would want
17 empirical evidence of that.

18 Q. You think it's likely that they have different self-
19 expressive benefits?

20 A. That would be my hypothesis.

21 Q. Did you do any work of your own to try and determine what
22 self-expressive benefits consumers of either adidas or Thom
23 Browne may have?

24 A. No. But neither really did Dr. Joachimsthaler.

25 Q. With regard to harm, you would agree that a junior user of

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Steckel - Cross

1 a similar mark can impair or harm the senior user's trademark?

2 A. I will agree with that, especially since the word is "can"
3 and not "will."

4 MS. SAYOUR: Objection, your Honor.

5 Q. And you agree that --

6 THE COURT: Wait a minute. There was an objection.
7 Hold on a moment.

8 What was the ground of the objection?

9 MS. SAYOUR: Scope.

10 THE COURT: Overruled.

11 BY MR. HENN:

12 Q. You also agree that one way a junior user can harm the
13 senior user's mark is that the senior user's brand awareness
14 and fall as a result of what the junior user has done?

15 A. I think that's theoretically possible. I think that's
16 extremely unlikely, and I've written as such.

17 Q. You also have written that one way a junior user can harm
18 the senior user's mark is that the marketing and sale of the
19 junior user's goods renders the associations with the senior
20 user less favorable?

21 A. That is theoretically possible from the strong favorable
22 and unique characterization of associations. But in order to
23 determine whether or not that happens, that is why you need
24 empirical evidence.

25 Q. Another way a junior user can harm the senior user is brand

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Steckel - Cross

1 associations formerly belonging to the senior user can become
2 shared between two different brands?

3 A. Yes. I think that, again, is theoretically possible, but
4 it didn't happen between -- in Mercedes, it did happen for
5 Infiniti. And, again, it's another reason you need empirical
6 evidence and not hand-waving.

7 Q. And each of those -- loss of awareness, associations being
8 less favorable, and being shared across the brands -- each of
9 those results in a loss in brand equity, correct?

10 A. If it happens, yes.

11 Q. In this case I think you characterized Dr. Joachimsthaler's
12 discussion of the memory networks as -- well, I forget the
13 derogative term you used.

14 You basically said you didn't like it, fair?

15 A. I think the words I used were complicated and overly
16 complicated and speculative.

17 Q. In this case, you didn't attempt to create any map of an
18 associative memory network for the adidas brand?

19 A. No. And if I were working for you, I wouldn't have either,
20 because it's a much simpler question of collecting
21 associations. You don't need to model the network.

22 Q. And you also didn't do any effort to create a model for
23 what Thom Browne's associative memory network might look like?

24 A. That's right. I didn't for the same reason.

25 Q. With regard to surveys and empirical evidence, you did not

N1AsADI6

Steckel - Cross

1 critique the methodology that Dr. Joachimsthaler employed with
2 regard to his three-stripe survey, correct?

3 A. The one, the recognition survey?

4 Q. Yes.

5 A. I did not.

6 Q. You would agree with me that the principle of spreading
7 activation or activation spreading is well-established in a
8 consumer psychology?

9 A. I think it's a useful framework from which a lot of
10 branding theory has been derived. Yes, I would agree. I'm
11 sorry, I'll agree with that.

12 Q. And you agree that when there are similar stimuli, similar
13 visual stimuli presented, there can occur spreading activation?

14 A. It's an empirical question. I presume it's possible, but
15 there is no evidence that any of that happened here.

16 Q. But you didn't look at the Poret survey?

17 A. The Poret survey was on post-sale confusion. I don't see
18 how that has anything to do with spreading activation.

19 Q. You weren't here for Dr. Joachimsthaler's testimony, right?

20 A. Um, I was told I was not permitted to be.

21 THE COURT: Yes.

22 MS. SAYOUR: Objection, your Honor.

23 THE COURT: The jury should understand that all
24 witnesses are excluded while other witnesses are testifying, so
25 he could not have been here even if he wanted to.

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Steckel - Cross

1 THE WITNESS: And I did want to.

2 THE COURT: Well, there is no accounting for that.

3 BY MR. HENN:

4 Q. Dr. Steckel, the image of people in your field acknowledge
5 spreading activation, correct?

6 A. I think that's fair. I think the majority of people who
7 study brands use spreading activation as one of the tools that
8 they use to analyze the theory that they develop.

9 Q. And one of the risks of shared activation is the generally
10 accepted principle that when the information presented to
11 consumers is not consistent with the inferences that aid their
12 judgment, subsequent messages from the brand might be
13 dismissed?

14 A. Counsel, I think you need to repeat the question. I am not
15 sure you used the terminology you wanted to.

16 Q. Fair enough. I'll repeat it.

17 You would agree with me, wouldn't you, that one of the
18 risks of shared activation, in other words where they are
19 sharing the connection, is the generally accepted principle
20 that when the information presented to consumers is not
21 consistent with the inferences that aid their judgment,
22 subsequent messages from the brand might be dismissed?

23 A. Oh, I think that's a principle that is much more general
24 than the context that you're describing, that whenever people
25 in general see information that is inconsistent with their

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Steckel - Cross

1 prior beliefs, they will resist that information.

2 Q. And although you didn't do --

3 A. I --

4 Q. I'm sorry.

5 A. Go ahead.

6 THE COURT: Before anything goes further, we're just
7 about at the end of today, so I think we'll have to continue
8 all this tomorrow.

9 So, ladies and gentlemen, we made great progress
10 today. We're on schedule. To stay on schedule, we'll start at
11 nine o'clock tomorrow.

12 So we will see you at nine o'clock. Have a very good
13 evening.

14 MR. HENN: Two questions.

15 (Continued on next page)

1 (Jury not present)

2 THE COURT: You can step down. We'll see you at nine.

3 THE WITNESS: I'll be here.

4 (Witness temporarily excused)

5 THE COURT: All right. Please be seated.

6 I have a 4:30 other matter, but I don't see yet all
7 counsel for that matter, so we can continue a little bit with
8 the discussion.

9 The question I had asked towards the very end of the
10 last discussion was: What's the relevance of willfulness in
11 this case?

12 MR. HENN: Three reasons it's relevant.

13 First, it is a defense to the defense of laches. So
14 if the jury were to say that adidas unreasonably delayed and
15 that there was evidence, sufficient evidence of material
16 prejudice, but found the infringement to be willful, laches
17 doesn't apply. So that's the first reason.

18 THE COURT: All right.

19 MR. HENN: The second reason is that although the
20 *Romag Fasteners* Supreme Court said wilfulness is no longer a
21 requirement for an award of profits, the way it used to be in
22 the Second Circuit, they indicated it is still a factor that a
23 jury -- or the court will rather, since it is equitable
24 relief -- that the court may consider in determining whether to
25 make an award of profits.

1 And then the final would be adidas does have in its
2 scope of relief a claim for fees under the Lanham Act, which
3 one of the factors that the court is permitted to look at in
4 that is whether the infringement was --

5 THE COURT: That's for the jury.

6 MR. HENN: No, that's not for the jury.

7 But a jury finding of willfulness could advise on
8 profits and on, ultimately, a fee award post trial.

9 THE COURT: That's very helpful.

10 Now I do see the lawyers for the next matter, so we
11 will see you all. I think we won't ask you to come in before
12 9:00. We will start promptly at nine o'clock tomorrow.

13 (Adjourned to January 11, 2023, at 9:00 a.m.)

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